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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-773

UNITED STATES LINES, INC., *Petitioner*

v.

SUN SHIPBUILDING & DRY DOCK COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX TO PETITION

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

The Decision Below Conflicts With A Prior Final Adjudication By The U.S. Court Of Claims 7

1.) The Court Of Claims Found That The Contract Payment Provisions Were Express and Enforceable 8

2.) The Courts Below Erroneously Refused To Reach The Merits Of USL's Collateral Estoppel Defense 10

The Second Interpretation Of The Contract Is Plainly Erroneous 12

1.) The Contract Expressly Fixed The Earliest Point At Which Disputed Change Costs Could Become Payable 12

2.) A Guarantee Clause Does Not Modify The Specific Contract Terms Governing Payment 14

The Lower Court Decision Is In Conflict With This Court's Decision Fixing The Time At Which A Contractor's Cause Of Action Accrues Under Standard Government Disputes Clause 15

The District Court's Erroneous Presumption That It Had Discretion To Award Interest From 1966 Is Not Supported By Either The Law Of Pennsylvania Or Analogous Federal Authorities 18

Page

Applying This Court's Rulings In The *Rice* and *Blair* Cases To The Language Of The Contract Involved Requires A Finding That Delay Associated Change Cost Claims Are Not Compensable 22

1.) No Delay Associated Cost Claims Are Compensable Under The Contract 23

2.) Delay Associated Change Cost Claims For Unchanged Work Arising Prior To The Fixed Contract Delivery Dates Are Not Compensable Under The Contract 26

CONCLUSION 29

The Appendix to this petition (with its own index) has been separately bound pursuant to Rule 23(i).

TABLE OF CASES AND AUTHORITIES

CASES:

Blonder Tongue Lab, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 (1971) 10
Bowser Inc. v. *United States*, 420 F. 2d 1057 (Ct. Cl. 1970) 11
Cold Metal Process Co. v. *United Engineering & Foundry Co.*, 235 F. 2d 224 (3rd Cir. 1956) 20
Commissioner of Internal Revenue v. *Sunnen*, 333 U.S. 591 (1948) 11
Crown Coat Front Co. v. *United States*, 386 U.S. 503 (1967) 3, 6, 8, 15, 16, 17
Edgar v. *United States*, 171 F. Supp. 243 (Ct. Cl. 1959) 9
Gloeckler v. *Imrie*, 118 Pa. Super. 441, 179 A. 2d 883 (1935) 20
Lackawanna Iron and Steel Co. v. *Lackawanna & Wyoming R.R.*, 299 Pa. 503, 149 A. 702 (1930) 21
Lynne Carol Fashions Inc. v. *Cranston Print Works Co.*, 453 F. 2d 1177 (3rd Cir. 1972) 10
Miller v. *Robertson*, 266 U.S. 243 (1924) 21
Murphy v. *Landsburg*, 490 F. 2d 319 (3rd Cir. 1973), Cert. denied 416 U.S. 939 (1974) 10
Oxford Manufacturing Co. v. *Cliff House Building Corp.*, 224 Pa. Super. 387, 307 A. 2d 343 (1973) .. 20

Page

Penneys v. *Pennsylvania R.R. Co.*, 408 Pa. 276, 183 A. 2d 544 (1962) 18
Petrovich v. *United States*, 421 F. 2d 1364 (Ct. Cl. 1970) 11
Prudential Insurance Co. v. *City of Philadelphia*, Dkt. No. 73-1109 (E.D. Pa., Oct. 24, 1975, Cahn, J.) .. 20
Ring Construction Corp. v. *United States*, 209 F. 2d 668 (8th Cir. 1954) 21
Sun Shipbuilding and Dry Dock v. *United States*, 461 F. 2d 1352 (Ct. Cl. 1972) 14
Swartzbaugh Manufacturing Co. v. *United States*, 289 F. 2d 81 (6th Cir. 1961) 21, 22
United States v. *Bethlehem Steel Corp.*, 113 F. 2d 301 (3rd Cir. 1940) aff'd 315 U.S. 289 (1941) 20
United States v. *Carlo Bianchi Co.*, 373 U.S. 709 (1963) 7
United States v. *Blair*, 321 U.S. 730 (1944) 3, 8, 22, 23. 27, 28
United States v. *Joseph A. Holpunch Co.*, 328 U.S. 234 (1946) 16
United States v. *Hopkins*, 427 U.S. 123 (1976) 7
United States v. *Munsingwear Inc.*, 340 U.S. 36 (1950) 9
United States v. *Silliman*, 167 F. 2d 607 (3rd Cir. 1948), Cert. denied 335 U.S. 825 (1948) 10
United States v. *Rice*, 317 U.S. 61 (1942) 3, 8, 22, 24, 28
United States v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966) 8, 15
United States Lines, Inc. v. *Secretary of Commerce et al.*, Dkt. No. 76-2347 (D.C.D.C. Sept. 21, 1977, Sirica, J.) 7, 17, 23
Vanderveer v. *Erie Malleable Iron Co.*, 238 F. 2d 510 (3rd Cir. 1956), Cert. denied 353 U.S. 937 (1957) 10
Waterman S.S. Corp. v. *United States*, 381 U.S. 252 (1965) 7
Weldfab, Inc., IBCA No. 268, 61-2 BCA § 3121 (1961) . 25
Weldon Kelley Co. v. *Pavia Co.*, 354 Pa. 75, 46 A. 2d 466 (1946) 20

STATUTES, REGULATIONS AND AUTHORITIES:

28 U.S.C. § 1254(1) 2
41 U.S.C. § 321 and 322 .....passim
32 C.F.R. § 7.103-2 26
32 C.F.R. § 7.602-3 26

Page

46 C.F.R. § 290 (1961) ..... passim

Corbin on Contracts at Section 1048, p. 292 12

O.S. Hiestand Jr., *A New Era in Government Construction Contracts*, 28 Fed. B.J. 165 (1968) 25

Restatement of the Law of Contracts, Section 337(a) (1932) 18

Spector, *An Analysis of the Standard Changes Clause*, 25 Fed. B.J. 177 (1965) 25

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SUN SHIPBUILDING & DRY DOCK COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, United States Lines, Inc. (hereinafter "USL") respectfully prays that a writ of certiorari issue to review the Order of Judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 5, 1978.

OPINIONS BELOW

The Order of the Court of Appeals not yet reported appears in the separate appendix hereto. The Memorandum and Order of the District Court for the Eastern District of Pennsylvania dated November 1, 1977 is reported at 439 F. Supp. 671 (1977) and appears in the separate appendix hereto (143a-161a) along with a related but unreported preliminary Memorandum and Order of that District Court dated February 16, 1977. (130a-140a).

The related administrative decision of the Maritime Subsidy Board and the modification ordered by the

Secretary of Commerce is reported in Volume 12 of the *Pike and Fischer, Shipping Regulation Reports* at 12 SRR 551 (1971) and 887 (1972) and appear in the separate appendix hereto (Board 23a-111a, Secretary 112a-118a).

The related opinions of the United States Court of Claims in *Sun Shipbuilding and Dry Dock Co.* v. *United States,* are not reported but appear in the appendix (119a-128a).[1] The Memorandum of the U.S. District Court for the District of Columbia in the related case of *United States Lines, Inc.* v. *Secretary of Commerce et al.,* is not reported but appears in the appendix along with the October 28, 1977 order of that Court transferring the matter to the District Court for the Eastern District of Pennsylvania. (180a-187a).

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered September 5, 1978. (176a). A timely petition for rehearing *en banc* was denied on October 3, 1978, (177a), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether a District Court may entertain a government contractor's collateral attack upon a final decision of the United States Court of Claims and essentially reverse the Court of Claim's prior adjudication by a second and erroneous interpretation of the payment obligations under the contract with complete dis-

[1] Dismissal without published opinion of Count II of SUN's petition to the Court of Claims is reported at 538 F. 2d 348 (Ct. Cl. 1976).

regard for the Court of Claim's prior determination of when payment obligations could arise under the contract.

Whether the express terms of a standard tripartite government contract may be reformed by a district court *sua sponte* to make disputed change cost claims "payable" with pre-judgment interest five years prior to the completion of the mandatory administrative disputes process which the parties agreed would be the earliest point in time that such change costs could become "payable" under the contract.

Whether, in the admitted absence of a claim for breach of contract, this Court's decision in *Crown Coat Front* v. *United States,* 386 U.S. 503, (1967) fixing the completion of a mandatory disputes process as the time at which a government contractor's claim first accrues may be avoided to allow the award of prejudgment interest prior to that date of first accrual of the cause of action.

Whether the limits on change cost claims under standard government contracts as enunciated by this Court in *United States* v. *Rice,* 317 U.S. 61 (1942) and *United States* v. *Blair,* 321 U.S. 730 (1944) may be avoided without regard for the language of the contract involved, thereby retroactively increasing the measure of compensation for accomplished changes to include delay associated claims for non-change work.

Whether a federal court in the exercise of diversity jurisdiction may disregard and go beyond the well established limits of state law to create an obligation to pay on terms contrary to the express payment provisions of the standard government contract involved.

STATEMENT OF THE CASE

On October 10, 1962, a tripartite construction contract for the building of 5 vessels was executed by United States Lines, Inc., SUN Shipbuilding Drydock and the United States of America. (1a)

The parties contracted for the completion of the basic contract work for $10,590,000 per vessel (an aggregate contract price of $52,950,000) (3a) with express contract provisions for change work, administrative determination of disputed change cost claims and the time for payment of change costs.

During the course of construction, USL and the Board initiated changes to automate the engineering plant and reduce crew quarters. Under contract Article 4, SUN estimated that it could accomplish both changes on all five vessels for $1,690,000. (25a and 26a) But, in November 1965, after late delivery of the vessels, SUN presented detailed estimates for change work, alleged costs of impact on unchanged work and alleged delay associated costs totaling $5,740,368. (26a-29a)

SUN received prompt and full payment from USL and the Maritime Administration for the basic contract price plus undisputed change costs. Also, USL voluntarily prepaid in 1966 an additional $651,444 representing 90% of its estimated share of *actual* change costs.

Not until December 1, 1969 did USL and SUN settle guarantee deficiency claims under this contract.

SUN's unsettled change cost claims became the subject of: a 1967 audit; a 1969 Contracting Officer's decision; a 1970 Examiner's recommended decision; a 1971 Board Decision (23a-111a) and review by the

Secretary of Commerce in 1972. (112-118a) SUN refused to accept as final under the contract any of these decisions including the Secretary's award of $3,070,547 on SUN's $6,688,895 claim.

In February 1972, the Maritime Subsidy Board presented to SUN and USL an addendum to adjust the Contract Price to reflect the full amount of the final award. USL executed this addendum but SUN refused.

On March 16, 1972, USL offered to pay: ". . . the amounts finally determined to be due by the Secretary of Commerce, in return for an appropriate release to United States Lines from SUN Shipbuilding and Drydock Co."

In 1973, SUN alleged by petition to the Court of Claims that payment was due to SUN under the contract as of February 1972, that USL was in default and that the Board was liable for USL's share. By Count II of its Petition, SUN also sought judicial review to increase the award from $3,070,547 to $7,000,000. The United States brought USL before the Court of Claims as a third party. USL interposed as defenses to SUN's claims that the final administrative decision was excessive. (123a-125a)

Count I, based on USL's alleged default, was disposed of by the Court of Claims May 1974, finding that USL was not in default because under the contract the award: ". . . cannot be viewed as a 'final' one to which plaintiff is entitled at this time as a matter of law." (119a-121a)

In an unsuccessful (122a) petition to this Court for certiorari to review that decision SUN admitted:

> ". . . in 1974 the Court of Claims decided that SUN still was not entitled to any payments on account

of change orders until its rights to the exact amount finally due was established as a matter of law."

* * *

"Under this interpretation, an approved estimate cannot be added to the contract price where a dispute is involved until the dispute has been settled, or judicial review exhausted."

SUN then filed (on August 7, 1975) the instant action against USL in the District Court for the Eastern District of Pennsylvania asserting federal diversity jurisdiction.

On May 28, 1976, the Court of Claims dismissed Count II of SUN's Petition (126a) and found:

"This disposition makes it unnecessary under the Court's *en banc* Order of May 31, 1974, [123a] to consider . . . the problem of so-called 'delay damages'. Since we affirm the administrative award without adding to it, . . . we need not reach (and we take no position on) those issues."

SUN's Petition for Certiorari to review this Order was denied November 29, 1976 (129a) [2] and in December, 1976 USL filed, in the District Court for the District of Columbia, to obtain Wunderlich Act review of the errors of law not reached. (*USL* v. *Secretary of Commerce et al.*, CA 76-2347).

On February 16, 1977, the District Court for the Eastern District of Pennsylvania found in accord with this Court's decision in *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, (1967), that SUN's cause of action

[2] After the denial of SUN's petition for certiorari, USL did not object to partial summary judgment for the unpaid balance of hardware costs without prejudice to USL's defenses of law. (141a)

against USL did not accrue until after the Board decision had been made. (135a-140a)

On September 21, 1977, the District Court for the District of Columbia found that USL was, under the contract and the Wunderlich Act, entitled to judicial review of the errors of law allegedly tainting the final administrative award (180a) and, that action was, on October 28, 1977, transferred to the District Court for the Eastern District of Pennsylvania. (187a)

On November 1, 1977, the District Court issued its decision reversing the Board's decision to the extent it had denied SUN's claims for prejudgment interest against USL, and affirming the Board's decision to the extent challenged by USL's defenses (143a). By Motion for Reconsideration, USL highlighted to the District Court the inconsistency between its February 16, 1977, finding that SUN had no cause of action against USL until 1972 and the award of prejudgment interest back to 1966, which motion was denied (173a) and judgment entered (175a).

USL filed a timely appeal to the U.S. Court of Appeals for the Third Circuit, which after oral argument, affirmed on September 5, 1978 ". . . for the reasons set forth in the District Court opinion. . .". (176a)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH A PRIOR FINAL ADJUDICATION BY THE U.S. COURT OF CLAIMS.

This Court has often resolved conflicts between the Court of Claims and the U.S. Courts of Appeal for the several circuits,[3] and has also recognized the impor-

[3] *United States* v. *Hopkins*, 427 U.S. 123, 124 (1976); *Waterman S.S. Corp.* v. *United States*, 381 U.S. 252, 258 (1965); *United States* v. *Carlo Bianchi Co.*, 373 U.S. 709 (1963).

tance of the correct interpretation of standard government contract provisions.[4] Here the conflict is between two judicial interpretations of *the same contract* requiring a writ of certiorari to review the Third Circuit's erroneous disregard for the Court of Claims' prior adjudication of when disputed change costs could first become payable under this standard government ship construction contract.

1.) The Court of Claims Found That The Contract Payment Provisions Were Express and Enforceable.

In 1974 at SUN's insistence, the Court of Claims in an action to which USL was a third party found that USL was not in default of its payment obligations under this contract for refusing to pay SUN's February 1972 invoice for disputed change costs. (119a)

There can be no doubt that the parties sought and obtained a final and binding interpretation of the contract provisions to be fulfilled before USL would be obligated to pay its share of disputed change costs. The question presented to the Court of Claims by the Government's October 2, 1973 motion was:

> "Whether the United States Lines is in 'default' under Article 31 of the contract between the parties".

In its October 26, 1973 reply SUN stated:

> "Defendant's brief has narrowed the issue before the Court on these cross motions for summary judgment: Does 'Finally determined' as it appears in Article 4(e) of the General Provisions of the Contract mean final administrative determination or final judicial determination."

[4] *United States* v. *Rice*, 317 U.S. 61, 62 (1942); *United States* v. *Blair*, 321 U.S. 730, 731 (1944); *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 400 (1966); *Crown Coat Front Co. Inc.* v. *United States*, 386 U.S. 503, 509 (1967).

The Court of Claims dismissal of Count I of SUN's petition was plainly predicated upon the necessary finding that USL was not, and could not be found, in default of the express payment obligations of the contract unless and until *all* Wunderlich Act challenges[5] had been adjudicated. (121a)[6]

By reinterpreting the contract to make change costs payable within the twelve months after SUN's unsupported detailed estimate was submitted, the courts below have erroneously circumscribed the jurisdiction of the Court of Claims and mistakenly disregarded that court's final and binding determination of what was to be paid when under this contract. (*Edgar* v. *United States*, 171 F. Supp. 243, 245-8 (Ct. Cl. 1959); *United States* v. *Munsingwear Inc.*, 340 U.S. 36, 38, (1950)).

The district court's reasoning adopted without comment by the Court of Appeals is that:

> ". . . Count I of SUN's complaint in the Court of Claims had no relevance to the issue of SUN's right to interest against USL; it dealt only with the issue of whether USL had *defaulted* to the extent that the government would be required to satisfy USL's obligations." (Emphasis in original—154a)

It cannot be denied that SUN's cause of action in the Court of Claims was based upon the allegation that

[5] SUN alleged only that findings of fact were not supported by substantial evidence, whereas USL's defenses related to both findings of fact and errors of law under 41 USC 321 & 322.

[6] A second Order of the same date describes the limited third party jurisdiction being exercised. (123a)

USL was in default, and that therefore the government was obligated to assume USL's payment obligations under the contract. Each of the elements of collateral estoppel exist with respect to the Court of Claims' finding that, USL was not in default of the contract payment terms. Lack of a USL payment obligation under the contract was the identical question decided by the Court of Claims, and the precise issue raised by USL's defenses to SUN's claim for prejudgment interest in the subsequent district court action. The Court of Claims prior adjudication was a final judgment finding SUN's default allegation against USL to be without merit in an action to which both SUN and USL were parties.[7]

2.) The Courts Below Erroneously Refused To Reach The Merits Of USL's Collateral Estoppel Defense.

After acknowledging that a decision by the U.S. Court of Claims may raise a bar of collateral estoppel (154a and 155a) the opinion below mistakenly refused to consider the merits of USL's defense of collateral estoppel on the issue of when disputed change costs are "payable" under the contract.[8]

> "Without reaching the merits of the res judicata argument, I find that the issue considered by the Court of Claims has no relevance to these proceedings. The Court of Claims was considering only the issue of whether the decision was final such that USL had defaulted by refusing to make payments pending further appeals. Even if the court by its dismissal of Count I of Sun's complaint did hold that USL had not defaulted, that decision in no way determines that USL should not be liable for interest on the debt it in fact owed." (153a)

[7] *Blonder Tongue Lab, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 323 (1971); *Lynne Carol Fashions Inc.* v. *Cranston Print Works Co.*, 453 F. 2d 1177, 1182 (3rd Cir. 1972)—a diversity action applying the law of Pennsylvania.

[8] This conflicts with the Third Circuit's decisions in *United States* v. *Silliman*, 167 F. 2d 607, 613-621 3rd Cir. 1948, cert. denied 335 U.S. 825 (1948); *Vanderveer* v. *Erie Malleable Iron Co.*, 238 F. 2d 510, 512 (3rd Cir. 1956), cert. denied 353 U.S. 937 (1957); *Murphy* v. *Landsburg*, 490 F. 2d 319, 321-323 (3rd Cir. 1973), cert. denied 416 U.S. 939 (1974).

This conclusion is based on two errors. First, the Court of Claims' limited jurisdiction to enter a judgment against a private third party does not restrict the scope of that court's jurisdiction to make the necessary contract interpretations required to dispose of a claim against the government. Such findings are not open to collateral attack in a second (albeit different) cause of action. (*Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 598, (1948)).

Both SUN, as plaintiff, and USL, as a third party, are bound by the Court of Claims' interpretation of the contract. *Petrovich* v. *United States*, 421 F. 2d 1364, 1370 (Ct. Cl. 1970) *Bowser Inc.* v. *United States*, 420 F. 2d 1057, 1060 (Ct. Cl. 1970)). The subject matter jurisdiction of the Court of Claims invoked by SUN, encompassed whether USL was then obligated to pay SUN since, without default of an existing obligation by USL, SUN had no recourse against the government.

Second, the Court of Claims clearly had jurisdiction to find that USL was in default and enter a money judgment against the United States as guarantor (with indemnity rights) for USL's share of the disputed change costs. The Court of Claims had jurisdiction to determine between and among *all* parties before that

Court the facts and law necessary to dispose of SUN's cause of action against the government.

Application of the doctrine of collateral estoppel does not hinge upon which side prevailed in the prior adjudication and it was error to disregard the Court of Claims' finding of no default. Absent default there is no principle obligation to pay upon which prejudgment interest may accrue.[9]

Had the opinion below reached the merits of USL's collateral estoppel defense it would have been compelled to conclude that the *identity of the issue* actually decided in the first action, and *not the remedy sought* in the second action, was controlling and barred SUN's claim for prejudgment interest because of the prior adjudication that USL was not in default.

THE SECOND INTERPRETATION OF THE CONTRACT IS PLAINLY ERRONEOUS.

1.) The Contract Expressly Fixed The Earliest Point At Which Disputed Change Costs Could Become Payable.

The opinion below recognizes that interest does not begin to run upon a debt until such time as the debt first becomes "payable" (150a) and also admits that when the amount involved first became "payable" is governed by the terms of the contract. (151a-153a) However, the lower courts plainly erred by concluding that:

> "Article 14 [the Guarantee Clause] of the contract clearly shows that it is intended to provide a formula whereby all transactions among the parties

[9] "It is clear that interest should not be awarded as damages unless the defendant is shown to have been in default." *Corbin on Contracts* at Section 1048, p. 292.

> are completed within one year of delivery of the final vessel". (151a)

To the contrary, other Special and General Provisions of the contract fully and specifically state the agreement of the parties as to how change costs were to be determined and then paid under the contract.[10]

Article IV of the Special Provisions of the contract entitled, "Payment of Contract Price", (4a) expresses the agreement of the parties on how and when the Contractor will receive payment of the contract price when adjusted. Paragraph (iii) of Article IV (d) includes the prerequisite that: ". . . the Board has determined that all disputes and claims under the contract have been settled or finally adjudicated . . .". (8a) Article 36 of the General Provisions (21a) states the mandatory procedures to resolve "any dispute" without a deadline for Board decisions.

The change clause, Article 4 of the General Provisions (14a), describes the steps required to adjust the basic contract price to cover the net change cost including the requirement that change costs be "Finally determined" before adjusting the contract price. (16a)

[10] As admitted in SUN's September, 1975, memorandum to the District Court:

> "Thus change order amounts do not become part of the contract price so that the Owner and the Government have an obligation to pay until the amount of change order has been 'approved' or 'finally determined.' "
>
> • • •
>
> "The Disputes Clause was invoked in this case (Complaint, paragraph 12), and SUN will prove (if there is any dispute) that the final MSB decision was made on September 21, 1971. It is therefore clear that the amount of the change order was not added to the contract price and U.S. Lines did not have an obligation to pay under the contract until September 21, 1971."

Article 31 of the General Provisions also fixes a Board decision as the earliest possible time to require payment of disputed change costs. (20a)

SUN did not submit its detailed estimate until after the ships had been delivered (27a), and the contract price had not been adjusted at delivery. Therefore, SUN's claims were in the category of "all other amounts payable to the Contractor" within the meaning of IV (d)(iii). That Article and Article 4(e) specifically provide that the contract price may not be adjusted and payment is not due until after any dispute has been "finally adjudicated" (8a) and/or "finally determined" (16a).

Since the Board decision was not final until February 15, 1972, (112a-116a), no payment obligation could have arisen before March 16, 1972.

2.) A Guarantee Clause Does Not Modify The Specific Contract Terms Governing Payment.

The reliance of the opinion below on Article 14 to impose a 12 month deadline on the disputes process is misplaced.[11] The alternative suggestion (152a) that USL could have avoided an interest penalty as the disputes process ran on by paying, based on SUN's 7 million dollar claim (of which 4 million was ultimately

[11] If SUN wished to assert that the disputes process was unreasonably delayed its remedy was a breach of contract action against the Board. See for example *Sun Shipbuilding and Dry Dock* v. *United States*, 461 F.2d 1352 (Ct. Cl. 1972) where SUN challenged the pace of the MSB's change cost disputes process. In response to SUN's allegation that "the Maritime Administration dallied too long" the Court concluded (with specific reference to the related SUN/USL dispute) that the Board was acting in a timely fashion. (461 F.2d at pp. 1358, 1359 and 1361)

found to be unsupported) is contra to the express payment terms of the contract requiring a Board decision on disputed change costs.

Article 14 is a materials and workmanship guarantee of six months and requires a final survey of the vessel to be conducted not later than six months after the guarantee period. (17a) If there is a dispute on guarantee items, it may go on for years as plainly demonstrated by the record in this case. It was not until December 1969 (4 years after delivery and 3½ years after the guarantee period expired) that SUN and USL settled guarantee deficiencies with respect to these vessels.[12]

By relying on Article 14 to make disputed change cost claims become "payable" on November 24, 1966, the opinion below ignored the plain and specific meaning of the contract, erroneously presumed ambiguity, and misconstrued the general guarantee provision to override the specific payment provisions.

THE LOWER COURT DECISION IS IN CONFLICT WITH THIS COURT'S DECISION FIXING THE TIME AT WHICH A CONTRACTOR'S CAUSE OF ACTION ACCRUES UNDER STANDARD GOVERNMENT DISPUTES CLAUSE.

This Court has recognized the importance of granting certiorari to review conflicting lower court interpretations of standard government contract disputes clauses and the rights and liabilities of parties under government-wide contract disputes procedures.[13]

[12] Article XIV(a) of the contract Special Provisions specifically provided that the disputes procedure of Article 36 would be employed to resolve disputed guarantee deficiency claims. (10a)

[13] *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 400 (1966); *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 509 (1967).

Here the opinion below mistakenly interpreted the payment, changes and disputes provisions of this standard government contract to conclude that payment by USL was due November 24, 1966, and that hence prejudgment interest could be awarded from that date even though the mandatory disputes process was not completed until February 1972.

In *Crown Coat Front Co.*, this Court held that a contractor's right of action on a claim within the disputes clause first accrues at the time of the final administrative action:

> ". . . When administrative proceedings with respect to a contractor's claim subject to the disputes clause extend beyond the completion of the contract his right of action first accrues when the administrative action is final and not before . . ." (386 U.S. at 509)

By presuming that SUN could demand payment of disputed change costs prior to the 1972 Board decision and thereby awarding prejudgment interest for the period consumed by the administrative disputes process, the court below (152a-153a) failed to adhere to this Court's ruling on when a government contractor's cause of action first accrues. (*Crown Coat,* at 512, *See also, United States* v. *Joseph A. Holpunch Co.*, 328 U.S. 234, (1946).)

Furthermore, the allowance of prejudgment interest prior to the final administrative decision of SUN's disputed change cost claims is contrary to the District Court's earlier (February 16, 1977) order finding that SUN's cause of action *against USL* did not accrue until the completion of the disputes process. (135a-140a)

It should be noted that this issue was raised by USL with respect to SUN's claims in order to insure that *Crown Coat* was consistently applied in the several consolidated cases then before the District Court wherein SUN had asserted that USL's guarantee deficiency claims against SUN (on another government contract) first accrued at vessel delivery.

SUN admitted in its 1975 brief to the District Court:

> "The Disputes Clause was invoked in the case . . . It is therefore clear that the amount of the change order was not added to the contract price and *U.S. Lines did not have an obligation to pay under the contract until September 21, 1971. Obviously, no cause of action accrued before that date.*" (Emphasis added).

The subsequent November 1, 1977 finding that Article 14 required the settlement of all disputes within one year after delivery and made all disputed amounts "payable" at that time completely contradicts the February 1977 finding that under this contract SUN's instant cause of action did not accrue until after the final administrative decision.[14]

The same terms of a single contract may not be given two such opposed interpretations. Either SUN's action against USL is barred by the statute of limitations, or, no amount could be "payable" so as to allow prejudgment interest prior to the 1972 administrative decision.

The decision below erroneously imposes prejudgment interest as a penalty for following the standard government contract disputes process. The exercise of this

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[14] *See also,* the September 1977 Order in *USL* v. *Sec. of Commerce,* D.C.D.C. Dkt. No. 76-2347 describing the "cycle" of lawsuits between the parties to this tripartite government contract. (180a).

Court's powers of supervision is required to maintain the integrity and unhindered enforcement of the contract disputes process and to avoid chilling a party's right to defend against exaggerated change cost claims.

THE DISTRICT COURT'S ERRONEOUS PRESUMPTION THAT IT HAD DISCRETION TO AWARD INTEREST FROM 1966 IS NOT SUPPORTED BY EITHER THE LAW OF PENNSYLVANIA OR ANALOGOUS FEDERAL AUTHORITIES.

The opinion below departs from and goes far beyond the established law of Pennsylvania which permits the award of prejudgment interest as damages only when, and from the date that, a defendant has *breached* an obligation to pay money and/or a principle amount of damages arising from the breach of an express or implied contract obligation.

As recited by the Pennsylvania Supreme Court in *Penneys* v. *Pennsylvania R.R. Co.*, 408 PA. 276, 183 A.2d 544, 546 (1962), Section 337(a) of the *Restatement of the Law of Contracts* (1932) provides the controlling rule of law on when interest is recoverable as damages:

> "If the parties have not by contract determined otherwise, simple interest at the statutory legal rate is recoverable *as damages for breach of contract* as follows:
>
> (a) When the defendant *commits a breach* of contract to pay a definite sum of money, or to render a performance the value of which in money is stated in the contract or is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter, interest is allowed on the amount of the debt or money value *from the time performance was due,* after making all the deductions to which the defendant may be entitled." (emphasis added)

In this diversity action the courts below were required to apply—not expand—the law of Pennsylvania with respect to prejudgment interest. However, the opinion below plainly errs in asserting that Pennsylvania law entitled the court to make a discretionary award of prejudgment interest in the undisputed factual context of this case.

The premise for this mistaken view of the applicable law is apparent at the outset of the opinion where, after citing authorities for the proposition that prejudgment interest should be awarded on a *liquidated* debt the court refuses to make a finding on whether or when SUN's claims were liquidated. Instead, the court shifts to an examination of the Pennsylvania law applicable where only the amount is unliquidated *but the obligation to pay as of a date certain is admitted or fixed as a matter of law or contract.* (146a & 147a)

Neither set of circumstances applies to SUN's claim for change costs under the contract since SUN's change cost claim was not liquidated prior to judgment, and was not due under the contract until either the 1972 final administrative determination [15] or the court's own on November 1, 1977 determination that USL was liable for delay associated change costs.[16] The contract terms, SUN's admissions, and the prior findings of the

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[15] The Board decision as upheld by the Court of Claims found that SUN's claims were not liquidated prior to the date the determination of the Board becomes final. (104a)

[16] In dismissing Count I of SUN's petition the Court of Claims found that the contract required the completion of *judicial* review of the Board's decision (119a)

District Court and the Court of Claims all dictate that the 1972 final administrative decision was the *earliest* point at which SUN's change claim could have become payable.

The second proposition asserted to support the existence of discretion to award prejudgment interest on an unliquidated claim is similarly not applicable. Again, no principle amount was payable under Pennsylvania law because, USL was not in breach of the contract either prior to the 1972 Board decision or prior to November 1, 1977.

SUN admitted in its June 1, 1977 Reply Brief:

> "... the legal basis for Sun's claim is not breach of contract but rather an implied right to interest *under* the contract. (emphasis in original)

The authorities, mistakenly relied upon by the courts below, involved the award of prejudgment interest on an amount which had become due as a debt or damages prior to judgment—circumstances not presented by SUN's claim against USL since, as SUN and the court admitted, USL was not in breach of contract.

Each of the Pennsylvania cases [17] giving rise to judicial discretion to award prejudgment interest involved a breach of contract (or tortious conduct) which by law imposed immediate liability on the defendant to pay

[17] *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 235 F. 2d 224 (3rd Cir. 1956); *United States* v. *Bethlehem Steel Corp.*, 113 F. 2d 301 (3rd Cir. 1940) aff'd 315 U.S. 289 (1941); *Prudential Insurance Co.* v. *City of Philadelphia*, Dkt. No. 73-1109 (E.D. Pa., October 24, 1975, Cahn, J.); *Weldon Kelley Co.* v. *Pavia Co.*, 354 Pa. 75, 46 A. 2d 466 (1946); *Gloeckler* v. *Imrie*, 118 Pa. Super. 441, 179 A. 2d 883 (1935); *Oxford Manufacturing Co.* v. *Cliff House Building Corp.*, 224 Pa. Super. 387, 307 A. 2d 343 (1973); *Lackawanna Iron and Steel Co.* v. *Lackawanna & Wyoming RR.*, 299 Pa. 503, 149 A. 702 (1930).

the principle amount of damages.[18] Given the express terms of the contract here involved the *earliest* point in time that USL could have been obligated to pay disputed change claims was the 1972 final administrative decision. Thereafter, the Court of Claims found that under the contract SUN's refusal to accept the administrative determination as final dictated that no amount became payable until judicial review was completed. The scope of federal court jurisdiction in diversity cases requires that the lower courts' venture beyond and contra to the established limits of the law of Pennsylvania on interest be reviewed and reversed by this Court.

The opinion below also refers to several federal cases as analogous authority for the court to award prejudgment interest without regard for the distinguishing fact that these cases involved contracts or statutes which made the disputed amounts payable upon the happening of a certain (accomplished) event.

For example, in *Ring Construction Corp.* v. *United States*, 209 F. 2d 668 (8th Cir. 1954) the event fixed by statute was the Secretary of War's unilateral determination of the amount of excess profits to be recovered from the war contractor (with an accompanying demand for repayment).

In *Swartzbaugh Manufacturing Co.* v. *United States*, 289 F. 2d 81 (6th Cir. 1961), the event fixed by a price renegotiation clause in the contract was the contracting

[18] Similarly, this Court's decision in *Miller* v. *Robertson*, 266 U.S. 243, 257 (1924) allowed prejudgment interest only as damages for a *breach of contract*.

officer's unilateral determination that the contractor had been overpaid by the government.

By comparison, USL, SUN and the government had agreed that the Board, not the Contracting Officer, would adjudicate disputed change cost claims and that any net amount in favor of SUN would not become payable until 30 days after the Board had "determined the final contract price". (8a) [19]

APPLYING THIS COURT'S RULINGS IN THE *RICE* AND *BLAIR* CASES TO THE LANGUAGE OF THE CONTRACT INVOLVED REQUIRES A FINDING THAT DELAY ASSOCIATED CHANGE COST CLAIMS ARE NOT COMPENSABLE.

In defense of SUN's diversity action, USL was compelled to assert the errors of law by which the administrative decision had included delay associated cost claims for unchanged work in its 1972 award. By interposing these defenses based upon this Court's rulings in *United States* v. *Rice,* 317 U.S. 61 (1942) and *United States* v. *Blair,* 321 U.S. 730 (1944), USL did not abandon its direct action for a judicial review of these issues then pending before the District Court for the District of Columbia (*United States Lines, Inc.* v. *Secretary of Commerce,* CA 76-2347).

USL continues to maintain that Wunderlich Act review of errors of law contained in an administrative decision may not be accomplished by a collateral action to which the government decision-makers are not parties.[20] However, since the courts below found that the government was not a necessary party to SUN's action and undertook to determine USL's defenses, this petition seeks review of the conflicts between the lower courts' decision and this Court's decisions in *Rice* and *Blair* requiring express contract language to permit the award of delay associated cost claims.

The administrative award provided SUN with compensation for two types of costs: (1) "Hardware Costs"—the actual cost of materials and labor attributable to the changes, and (2) "Delay Associated Costs"—incurred in the performance of unchanged work, including delay in schedule, labor escalation, unabsorbed overhead, insurance, engineering disruption, production disruption, and congestion. (111a and 116a). Delay associated cost claims were allowed both prior and subsequent to the fixed contract delivery dates. (64a-72a and 115a).

1.) No Delay Associated Cost Claims Are Compensable Under The Contract.

The *Rice Doctrine* established by this Court requires that consequential costs flowing from delay to *unchanged work* are not compensable unless the contract so stipulates. (317 U.S. at 67) Here, the contract terms plainly limited SUN's compensation to actual change costs, plus allowed an equitable adjustment in the delivery dates to cover any delays.

[19] As the Board found:

"This fact that a demand for payment cannot be made until after a decision of the Board distinguishes this case from *Swartzbaugh Mfg. Co.* v. *United States,* 289 F. 2d 81 (6th Cir. 1961), relied on by Sun. In that case the Government under the contract could, and did, demand payment after the Contracting Officer's decision." (104a)

[20] 41 USC 322 (188a); On September 21, 1977, the District Court for the District of Columbia found that the government decision-makers cannot avoid defending their administrative decisions. (184a and 185a)

The Board's decision to view this as an oversight and belatedly construe the language of the contract to allow delay associated cost claims for unchanged work constitutes plain error in conflict with this Court's decision in *Rice,* which considered the proper interpretation of two clauses in that standard government contract. This Court found the two clauses (quoted below) [21] provided for cost increases to reflect actual change work with only an extension of time to adjust for change impact delays to unchanged work.

The *Rice* contract features are contained in the MarAd construction contract. Article 4(d) of the MarAd contract, (15a and 16a) concerning the "net increase or decrease in the cost of the contract work and probable delay in delivery of the vessel to result from such change" provides for the same adjustments as Articles 3 and 4 in *Rice.* MarAd Article 5(b) also covers the extension of time adjustment. (165a) The MarAd contract, as did the *Rice* contract makes a separate provision for the assessment of liquidated damages when an equitable adjustment of the contract delivery date is found unwarranted. (9a and 16a)

[21] "Article 3. *Changes.* The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. *If such changes cause an increase or decrease in the amount due under this contract,* or in the time required for its performance an equitable adjustment shall be made and the contract shall be modified in writing accordingly." • • •
(Emphasis added).

"Article 4. *Changed conditions.* Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, *and any increase or decrease of cost and/or difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.*" (Emphasis added).

As evidenced by the lengthy analysis contained in the Board's 1971 decision (48a-64a) the question of delay associated cost claims under this contract posed issues not fairly within the scope of change cost compensation as agreed to by the parties in 1963. Indeed, SUN's initial change cost estimate of $1,690,000 did not include a delay associated change cost factor. (25a-27a)

Although contract language may be changed to avoid the Rice Doctrine and to provide for delay associated cost claims for unchanged work, MarAd did not make such modifications to this contract.[22]

[22] For example: A 1958 revision of the standard government supply contract was considered in *Weldfab, Inc.*, IBCA No. 268, 61-2 BCA § 3121 where the Board concluded that the addition of the words "whether changed or not changed by any such order" was intended to—and did in fact—overcome the obstacles created by *Rice,* "so as to provide adjustment for costs incurred by reason of the issuance of change orders and affecting work which was not physically altered by the changes". *See* Spector, *An Analysis of the Standard Changes Clause,* 25 Fed. B. J. 177, 185 (1965), and O. S. Hiestand Jr., *A New Era in Government Construction Contracts,* 28 Fed. B. J. 165, 174 (1969) for other views attaching the same significance to the new language.

There are no material differences between the MarAd contract and the contract in *Rice*.[23] Thus, no basis exists for excusing the MarAd contract from the limitations on relief imposed by the *Rice* doctrine. *Rice* was the prevailing rule of interpretation of such language at the time this contract was executed, and the *Rice* doctrine must be applied to the language of the contract and the facts of this case.

Rather than decide the issue of law presented, the District Court upheld the Board's decision not to apply the *Rice* doctrine to SUN's claims by deferring to the Board's expertise and presuming that:

> "The *Rice* case in recent years has not met with favorable reaction by the Court of Claims and there is serious doubt whether it could be upheld in full by the Supreme Court today." (157a)

Any modification to the well established and long standing government contract principles enunciated by this Court in the *Rice* case should be made by this Court and then only for prospective application.

2.) Delay Associated Change Cost Claims For Unchanged Work Arising Prior To The Fixed Contract Delivery Dates Are Not Compensable Under The Contract.

The final administrative award to SUN includes delay costs claimed by SUN for a fifteen-day period prior to the fixed contract delivery dates for each vessel. The number of days and daily costs are facts determined by

[23] The "changes" clause of the standard form fixed-price Government construction contract, was not revised until 1968 and then by the same language that had been inserted in the standard supply contract—which does not appear in this MarAd Contract. (32 CFR § 7.602-3 and 32 CFR § 7.103-2)

the administrative decision [24] as affirmed by the Court of Claims. However, the legal issue of whether SUN is entitled to recover such predelivery contract date delay costs under *United States* v. *Blair*, 321 U.S. 730 (1944) was not reached by the Court of Claims. (127a)

The issue of pre-delivery date costs is of course related to the recovery of delay associated costs. If, the *Rice Doctrine* bars recovery for any delay associated cost claims, then no issue remains as to recovery of predelivery delay associated claims. However, even if recovery of some delay associated costs may be read into the contract, the question of recovery for delay associated costs claimed as a result of inability to complete performance *in advance* of the fixed delivery dates established in the contract requires separate analysis. (See, for example, the Board's two part discussion on *Rice* (48a-56a) and *Blair* (56a-64a)).

The issue in *Blair* and here is whether the contract contains any express obligation for completion of performance in advance of the fixed delivery dates.

In *Blair*, this Court found:

> "We are of the opinion, however, that nothing in the Government construction contract used in this case imposed an obligation or duty on the Government to aid respondent in completing his contract prior to the stipulated completion date and that it

[24] It must be noted that while the Board found that there was no prohibition against claims for delay associated costs based on early delivery of the vessels (63a and 64a) it also found that SUN had failed to "sustain its burden of proving that it not only intended to delivery early but that it [SUN] would in fact have delivered the vessels prior to the scheduled contract delivery dates." (70a) This latter finding of failure of proof was reversed by the Secretary of Commerce. (114a and 115a)

> was error for the Court of Claims to award damages to respondent based upon a breach of this nonexistent obligation." (321 U.S. at 733)

Thus, *Blair* requires that before an obligation to pay pre-delivery date costs can be imposed, the intent to do so must be conveyed, and the language of the contract must explicitly state an obligation which is mutually enforceable.

In making its determination that precontract delivery date delay associated claim *could* be compensated (if proven) under this contract the Board admitted:

> "There is no precedent to support such recovery. In the context of the *Rice* doctrine and possibly of broader applicability, *United States* v. *Blair,* 321 U.S. 730 (1944), which has not been overruled, denied such recovery based on lack of explicit language in the contract to cover such costs." (59a)

The decision below erred by refusing to apply this Court's holding in *Blair* to bar recovery of SUN's claim for pre-delivery date delay costs.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-773

UNITED STATES LINES, INC., *Petitioner,*

v.

SUN SHIPBUILDING & DRY DOCK CO., *Respondent.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS OF SEPARATEDY BOUND APPENDIX TO THE PETITION

Page

Relevant Portions of Contract for the Construction of Single Screw Cargo Vessels MA Design C4-S-64(a) for United States Lines Co. (MA/MSB Contract No. 11 (Special provisions) 1a

Relevant Portions of General Provisions of the Standard Form Construction Differential Subsidy Contract Approved by the Federal Maritime Board on May 25, 1961 ..... 12a

The Final Opinion and Order of the Maritime Subsidy Board, Dated August 11, 1971 ... 23a

Order and Final Award of the Maritime Subsidy Board, Dated September 24, 1971 ..... 107a

Order of Secretary of Commerce, Dated November 9, 1971 ..... 112a

Order of Secretary of Commerce, Dated January 5, 1972 ..... 113a

Order of the Secretary of Commerce, Dated January 20, 1972 ..... 114a

Order of the Secretary of Commerce, Dated February 15, 1972 ..... 117a

U.S Court of Claims' May 31, 1974, Order Dismissing Count I of SUN's Petition in Dkt. 61-73 ..... 119a

November 18, 1974, U.S. Supreme Court Order Denying SUN's Petition for Certiorari to the Court of Claims 122a

Page

U.S. Court of Claims *en banc* Order of May 31, 1974, With Respect to USL's Affirmative Defenses, Dkt. 61-73 ..... 123a

May 28, 1976, Final Order of the Court of Claims Dismissing Count II of SUN's Petition in Dkt. 61-73 ..... 126a

November 29, 1976, U.S. Supreme Court Order denying SUN's Petition for Certiorari to the Court of Claims 129a

February 16, 1977, Memorandum and Order of Judge Cahn in Consolidated Actions, C.A. Nos. 75-2275 and 75-244 ..... 130a

June 27, 1977, Order for Partial Summary Judgment, C.A. No. 75-2275 ..... 141a

November 1, 1977, Memorandum and Order on Cross-Motion's for Summary Judgment, C.A. No. 75-2275 ..... 143a

November 22, 1977, Order Denying USL's Motion for Reconsideration, C.A. 75-2275 ..... 173a

November 30, 1977, Judgment, C.A. 75-2275 . 175a

September 5, 1978, Judgment Order of the U.S. Court of Appeals for the Third Circuit, Dkt. No. 78-1025 ..... 176a

October 3, 1978, Order of the U.S. Court of Appeals for the Third Circuit denying USL's Petition for Rehearing 177a

October 16, 1978, Order of the U.S. Court of Appeals for the Third Circuit to stay issuance of Mandate 178a

Page

September 21, 1977, Order and Memorandum of Judge Sirica in related Civil Action No. 76-2347 in the U.S. District Court for the District of Columbia captioned *United States Lines Inc. v. Secretary of Commerce, Juanita Kreps, et al.* 179a

October 28, 1977, Order transferring C.A. No. 76-2347 from the U.S. District Court for the District of Columbia to the U.S. District Court for the Eastern District of Pennsylvania 187a

Relevant Text of Wunderlich Act, 41 USC 322 ..... 188a

RELEVANT PORTIONS OF CONTRACT

Contract No. MA/MSB-11

CONTRACT
FOR THE CONSTRUCTION OF
SINGLE SCREW CARGO VESSELS
MA DESIGN C4-S-64a
FOR
UNITED STATES LINES COMPANY

THIS CONTRACT, entered into as of the 10th day of October 1962 by and between the UNITED STATES OF AMERICA, represented by the Secretary of Commerce, acting by and through the MARITIME SUBSIDY BOARD (said Secretary of Commerce acting by and through the Maritime Subsidy Board being herein called the "Board"), UNITED STATES LINES COMPANY, a corporation organized under the laws of the State of New Jersey (hereinafter called the "Owner"), and Sun Shipbuilding and Dry Dock Company, a corporation organized under the laws of the State of Pennsylvania (hereinafter called the "Contractor");

WITNESSETH:

WHEREAS:

1. Pursuant to Sections 501(a) and 504 of the Merchant Marine Act, 1936, as amended (herein referred to as the "Act"), all of the applicable requirements of Title V of the Act, and other applicable provisions of law, the Owner, a citizen of the United States, has made application to the Board for a construction-differential subsidy to aid in the construction of five (5) single screw cargo vessels, MA Design C4-S-64a (herein called the "Vessels"), to be used in the foreign commerce of the United States; and

2. The Owner has represented and the Board has determined that (a) the Plans and Specifications call for the construction of vessels which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of such commerce, and be suitable for use by the United States for national defense or military purposes in time of war or national emergency; (b) the Owner possesses the ability, experience, financial resources, and other qualifications necessary to enable it to operate and maintain the Vessels; and (c) the granting of the aid applied for is reasonably calculated to replace worn-out or obsolete tonnage with new and modern ships, or otherwise to carry out effectively the purposes and policy of the Act; and

3. The Board has approved the Plans and Specifications for the construction of the Vessels as submitted by the Owner; and

4. The Board has submitted the Plans and Specifications for the construction of the Vessels to the Department of the Navy and has received the required approval thereof; and

5. The Owner, in accordance with Section 504 of the Act, desires to finance its portion of the cost of the construction of the Vessels; and, in accordance with the Owner's application, the Board has permitted the Owner to obtain and submit to the Board the competitive bids from domestic shipyards for such work; the Contractor has submitted a bid; the Owner desires to have the Vessels built in the Contractor's shipyard; the Board considers the bid of the Contractor to be fair and reasonable and has approved it; and the Board desires to become a party to the contract for the construction of the Vessels and has, by contract issued simultaneously herewith, agreed to pay a

construction-differential subsidy in an amount determined by the Board in accordance with Section 502 of the Act.

NOW, THEREFORE, in consideration of the premises and of the mutual promises hereinafter set forth, the parties hereto agree as follows:

SPECIAL PROVISIONS

ARTICLE I. *General Statement of Work.* (a) The Contractor shall furnish all labor and material and shall perform all work necessary to construct, build, complete and deliver, at its own risk and expense, five single screw cargo vessels, MA Design C4-S-64a (herein called the "Vessels"), in strict accordance with the Plans and Specifications referred to in Article II hereof, including National Defense features, and will do everything required of the Contractor by this contract (these Special Provisions, the General Provisions approved by the Board on May 25, 1961, referred to at 26 Federal Register 5039 and made a part hereof, and the Plans and Specifications are all hereafter called the "Contract"), including the installation of any outfitting and equipment which the Plans and Specifications provide shall be furnished by the Owner and including the development of working plans, all for the consideration of Fifty Two Million Nine Hundred and Fifty Thousand Dollars ($52,950,000.) (herein called the "Contract Price"), together with such additions and subject to such deductions as are herein provided.

(b) The Vessels shall be identified as Maritime Administration Hull Nos. 146, 147, 148, 149 and 150 and Contractor's Hull Nos. 628, 629, 630, 631, and 632 and shall be constructed in the Contractor's plant or shipyard (herein called the "Shipyard"), located at Chester in the State of Pennsylvania. Upon completion of the work, as required by the Contract, and after passing the tests provided in the

Contract, each Vessel as completed shall be delivered to the Owner, after five (5) days' notice to the Owner, alongside a safe and accessible pier at the Shipyard, where there must be sufficient water for such Vessel always to be afloat, custom to the contrary notwithstanding; free and clear of all liens and claims of every nature except those arising out of the acts or omissions of the Owner or the Board, such delivery and acceptance by the Owner to be subject, however, to any guarantees provided in the Contract. Upon such delivery, the Owner shall give the Contractor a receipt for the Vessel and shall within five (5) days thereafter, remove or cause the Vessel to be removed from the Shipyard.

(c) The work to be performed hereunder shall be commenced immediately shall be prosecuted with due diligence, and shall be completed and delivery of each Vessel (in all respects complying with the terms of the Contract) made on or before the delivery dates in the following schedule:

Administration Hull Numbers	*Contractor's Hull Numbers*	*Contract Delivery Date*
146	628	Sept. 29, 1964
147	629	Dec. 13, 1964
148	630	Feb. 26, 1965
149	631	May 12, 1965
150	632	July 26, 1965

• • •

ARTICLE IV. *Payment of Contract Price.* (a) Progress payments on account of the Contract Price, adjusted as herein provided, shall be made to the Contractor by the Owner and the Board as the contract work progresses. The amounts of such payments shall be determined substantially in accordance with the usual Board practice of

dividing the Contract Price into points representing the estimated cost of labor and material of the various components of the Contract Price and measuring such progress by the per cent of completion of said portions of the Contract Price as attested by representatives of the Board, the Owner and the Contractor. Such progress payments shall be made at monthly intervals, or at such other intervals as the parties agree, as follows:

(i) The Board shall pay the Contractor forty eight and six tenths per cent (48.6%) and the Owner shall pay the Contractor fifty one and four tenths per cent (51.4%) of that portion of each progress payment on account of the Contract Price set out in Article I(a) hereof (excluding, however, the sum of Ninety Thousand Five Hundred Dollars ($90,500.) of the Contract Price for the National Defense features incorporated in the Vessels).

(ii) The Board shall pay the Contractor forty eight and six tenths per cent (48.6%) and the Owner shall pay the Contractor fifty one and four tenths per cent (51.4%) of that portion of each progress payment on account of the net increase in Contract Price, pursuant to Article 4 of the General Provisions, for changes in the contract work approved by the Board as eligible for construction-differential subsidy; provided, however, in the event there is a net decrease in the Contract Price on account of such changes, the amounts otherwise payable by the Owner and the Board pursuant to this Article IV shall be reduced by the respective percentages of such net decrease.

(iii) The Board shall pay the Contractor one hundred per cent (100%) of that portion of each progress payment on account of Ninety Thousand Five Hundred

Dollars ($30,500.) of the Contract Price set out in Article I(a) hereof for the National Defense features incorporated in the Vessels.

(iv) The Board shall pay the Contractor one hundred per cent (100%) of that portion of each progress payment on account of the net increase in the Contract Price, pursuant to Article 4 of the General Provisions, for changes in the Plans and Specifications of the National Defense features; provided, however, in the event there is a net decrease in the Contract Price on account of such changes, the amounts otherwise payable by the Board pursuant to this Article IV shall be reduced by the amount of said net decrease.

(v) The Owner shall pay the Contractor one hundred per cent (100%) of that portion of each progress payment covering increases in the Contract Price pursuant to Article 4 of the General Provisions hereof on account of changes of the Owner approved by the Board but not approved as eligible for construction-differential subsidy provided, however, in the event there is a decrease in the Contract Price on account of such changes, the amounts otherwise payable by the Owner shall be reduced by the amount of such decrease.

(b) The aggregate of the progress payments provided in (a) above shall not be in excess of:

(i) Ninety-five per cent (95%) of the value (as represented by the Contract Price set out in Article I(a) hereof) of the work performed and materials delivered to the Shipyard for the construction of the Vessels (subject, however, to the provisions of paragraph (c) of this Article); plus

(ii) Ninety-five per cent (95%) of any cumulative net increase in Contract Price pursuant to Article 4 of the General Provisions, as of the date of said partial payment; or minus

(iii) Ninety-five per cent (95%) of any cumulative net decrease in Contract Price determined pursuant to Article 4 of the General Provisions, as of the date of said partial payment.

(c) The Board and Owner may, on such terms and conditions as the Board may prescribe, include as part of the value of the work performed on the Vessels, work performed by any subcontractor on materials, machinery or equipment to be installed in the Vessels, although not yet delivered, if the title to such materials, machinery or equipment included as part of the value of the work done on the Vessels shall have vested in the Contractor, subject, however, to the subcontractor agreeing to bear the risk of loss of such materials, machinery or equipment until delivered to the Shipyard, and provided, however, that all amounts included in respect of any such subcontractors' work shall be paid to the subcontractors within thirty (30) days.

(d) The amounts withheld under the provisions of paragraph (b) of this Article (IV) plus any other amounts payable to the Contractor under the terms of the Contract shall be paid as follows:

(i) One-half of the amount so withheld as to each Vessel, except the last Vessel, shall be payable promptly after the delivery of such Vessel.

(ii) The remaining one-half of the amount withheld as to each Vessel, except the last Vessel, shall be paid promptly upon completion of the final guarantee survey of such Vessel held pursuant to Article

14(c) of the General Provisions of the Contract, less, however, any amount required by the Board to be withheld as additional security to protect the Owner and the Board with respect to all remaining contractual obligations of the Contractor, including the cost of remedying any remaining delivery or guarantee deficiencies and any disbursements by the Owner pursuant to Article 14 of the General Provisions, and neither the Contractor nor anyone claiming through the Contractor shall have any claim against such withheld amounts unless and until such obligations and guarantee deficiencies are remedied. The Owner and the Board may apply such withheld amounts towards the payment of or reimbursement for the expense of fulfilling such contractual obligations and remedying such deficiencies and the Contract Price and progress payments shall be adjusted and satisfied accordingly. Any amounts remaining of such deductions after remedying such deficiencies shall, however, be thereafter payable progressively promptly as such obligations and deficiencies are settled, except with respect to the last Vessel.

(iii) All other amounts payable to the Contractor pursuant to this Contract shall be paid by the Owner and the Board within thirty (30) days after (a) the Owner has notified the Board that all delivery and guarantee obligations have been satisfied, and (b) the Board has determined that all disputes and all claims under the Contract have been settled or finally adjudicated, and has also determined the final contract price.

(e) No payments shall be made except on bills, vouchers, or invoices submitted in such number or form and executed and attested in such manner as shall be prescribed by the Owner with the approval of the Board.

(f) The books, files and all other records of the Contractor and of any holding, subsidiary, affiliated or associated company shall at all times be subject to inspection and audit by representatives of the Board.

(g) The Vessels and the Shipyard of the Contractor shall at all times be subject to inspection by the Board and the Owner.

* * *

Article V. LIQUIDATED DAMAGES The liquidated damages provided for in Article 6 of the General Provisions of the Contract are Two Thousand Two Hundred Dollars ($2,200.00) for each Vessel for each day of delay, of which Two Thousand Dollars ($2,000.00) shall be paid to the Owner and Two Hundred Dollars ($200.00) shall be paid to the Board.

* * *

Article XIII. GUARANTEE. (a) In addition to the guarantee responsibility of the Contractor under provisions of Article 14 of the General Provisions, the Contractor makes the following guarantee with respect to each of the Vessels based on the performance on trial of the first Vessel built by the Contractor: The Contractor guarantees that the fuel oil consumption rate for each Vessel as demonstrated during the four-hour trial of the first Vessel built by the Contractor at 12,800 SHP in accordance with the corrections stipulated in the Plans and Specifications, shall not exceed five hundred and twenty thousandths (0.520) pounds of fuel oil per shaft horsepower per hour for all purposes. The corrected fuel oil consumption rate, as determined on such trial, will be used in computing the following:

(i) In the event that the corrected fuel oil consumption rate shall exceed five thousand two hundred and fifty two ten-thousandths (0.5252) pounds of fuel oil per shaft horsepower per hour for all purposes under the conditions stipulated, the Contractor shall pay to the Owner, with respect to each Vessel, on or before the expiration of its

guaranty period as specified in Article 14 of the General Provisions as liquidated and agreed damages, and not as a penalty, the sum of Thirty Five Thousand Dollars ($35,000.00) for each interval of one one-hundredth (0.01) of a pound of fuel oil per shaft horsepower per hour, or pro rata for each fraction thereof, by which the corrected fuel oil consumption rate exceeds the said five thousand two hundred and fifty two ten-thousandths (0.5252) pounds of fuel oil per shaft horsepower per hour.

(ii) For the purposes of Article 15 of the General Provisions, the amount of liquidated damages, if any, paid by the Contractor pursuant to the provisions of subparagraph (a)(i) of this Article XIII shall not be included in contract costs.

(b) In lieu of the payment of liquidated damages specified in subparagraph (a)(i) of this Article XIII, the Contractor shall have the privilege of making any modifications in machinery, systems, equipment or outfit of the Vessels satisfactory to the Owner and approved by the Board.

Article XIV. MODIFICATIONS TO GENERAL PROVISIONS. The General Provisions referred to in Article I hereof are modified as follows:

(a) Add the following at the end of Article 14(b):

"Within 30 days after such determination has been communicated to the Contractor, the Contractor, if it disputes the determination, shall submit the determination to the Chief, Office of Ship Construction, of the Maritime Administration, as a dispute for decision by such Chief, Office of Ship Construction, with the right of appeal to the Board, all as provided in Article 36 hereof."

* * *

June 7, 1961 FEDERAL REGISTER 5030

TITLE 46 – SHIPPING

Chapter II—Federal Maritime Board,
Maritime Administration,
Department of Commerce

SUBCHAPTER C—REGULATIONS AFFECTING SUBSIDIZED VESSELS AND OPERATORS

PART 290—FORMS

Construction-Differential Subsidy
Construction Contract; General Provisions

The following new §290.1 is hereby added to this Part 200:

§290.1 Construction-Differential Subsidy Construction Contract; Part II, General Provisions

(a) The Federal Maritime Board on May 25, 1961, adopted as supplemental to the existing form of Constriction-Differential Subsidy Agreements under Title V, Merchant Marine Act, 1936, as "Federal Maritime Board—Construction-Differentail Subsidy Construction Contract Part II, General Provisions (Approved May 25, 1961)".

(b) Copies of the form, identified as Part II, General Provisions, may be obtained by persons having a proper interest upon application to the Secretary, Federal Maritime Board, Washington 25, D.C.

(Sec. 204. 49 Stat. 1937, as amended; as U.S.C. 1114)

Dated: June 2, 1961.

By order of the Federal Maritime Board.

THOMAS LISI
Thomas Lisi
Secretary

(F.R. Dec. 61-5257; Filed, June 6, 1961; 8:50 a.m.)

RELEVANT PORTIONS OF GENERAL PROVISIONS

FEDERAL MARITIME BOARD CONSTRUCTION CONTRACT PART II, GENERAL PROVISIONS (APPROVED MAY 25,1961)

Article 1. PURPOSE. These General Provisions form a part of the contract incorporating these General Provisions by reference therein.

Article 2. DEFINITIONS. As used throughout this contract the following terms shall have the meanings set forth below:

(a) The term "Board" means the Federal Maritime Board.

(b) The term "Contractor" means the ship contractor who in this contract has contracted to perform the contract work.

(c) The term"Owner" means the corporation which is designated as "Owner" in the Special Provisions of this contract.

(d) The term "Vessel" means the new vessel or the several new vessels or each of such several new vessels, if this contract covers the construction of a new vessel or of several new vessels; or the vessel or the several vessels or each of the several vessels to be reconstructed or reconditioned, if this contract covers the reconstructing or reconditioning of a vessel or of several vessels.

(e) The term "delivery date" means the date on which the Contractor delivers to the Owner the completed new vessel, or the respective date on which the Contractor delivers to the Owner each of the completed new vessels, or the date on which the Contractor delivers to the Owner the reconstructed or reconditioned vessel, or the respective date on which the Contractor delivers to the Owner each of the reconstructed or reconditioned vessels, depending upon whether this contract covers the construction of a new vessel, the construction of several new vessels, the reconstructing or reconditioning of a vessel, or the reconstructing and reconditioning of several vessels.

(f) The term "contract delivery date" means the date or the respective dates provided in the Special Provisions for the delivery to the Owner by the Contractor of the completed new vessel or vessels or the reconstructed or reconditioned vessel or vessels, as such date is extended pursuant to the terms of this contract.

(g) The term "material" includes but is not limited to any raw, in-process or manufactured machinery, equipment, component, accessory, part, assembly or product of any kind which will be a direct material cost charge to the contract work.

(h) The term "contract work" means all of the construction, reconstructing, or reconditioning work to be performed by the Contractor pursuant to the provisions of the Special Provisions, the Plans and Specifications and the General Provisions of this contract.

(i) The term "Shipyard" means the site of the contract work, that is, the Contractor's shipyard, plant, or other site or location as is specifically provided in this contract as the place of performance of the contract work.

(j) The term "the contract" or "this contract" means the contract which incorporates these General Provisions by reference therein and collectively includes the Special Provisions, the Plans and Specifications and the General Provisions of said contract.

(k) The term "subcontract" means any agreement (purchase order, requisition or other form of agreement) between the Contractor (or in the case of a subcontractor, between such subcontractor) and any third party excluding employees covering the performance of any of the construction, reconstructing or reconditioning on or for a vessel or portion thereof or for the manufacture or furnishing of any service directly for such construction, reconstructing or reconditioning.

(l) The term "Plans and Specifications" means collectively all of the documents, drawings, plans, specifications and amendments, modifications and supplements thereto

referred to in the Special Provisions as the Plans and Specifications for the construction of the vessel.

Article 4. CHANGES IN PLANS AND SPECIFICATIONS AND ADJUSTMENTS OF CONTRACT PRICE FOR CHANGES INCREASING OR DECREASING CONTRACT WORK. (a) The Contractor shall not depart from the requirements of the Plans and Specifications without prior written authorization by the Owner approved by the Board. In making application to the Owner for approval of a change in the Plans and Specifications, the Contractor shall set forth clearly the reasons for and the advantages of such change and shall submit its preliminary estimate of the change in cost, weight, moments and centers and delay in delivery of the Vessel, which estimate shall be accompanied by a full description of the completed work which would be eliminated or would have to be modified, of the acquired material which would not be used if the change is approved and of the effect, if any, of the proposed change upon any guarantee of the Contractor under this contract. The Owner shall consider the Contractor's request with all expedition and dispatch and shall present promptly all relevant data to the Board for approval, together with the Owner's recommended approval or disapproval of the Contractor's request. The Owner shall advise the Contractor in writing of its decision on the Contractor's request, as approved by the Board.

(b) The Owner, with the approval or authorization of the Board , may direct any change in the Plans and Specifications effecting a deduction from or an addition to the contract work set out therein within the general scope thereof; provided, however, if a directed change in the Plans and Specifications affects a specific guarantee set out in the Specifications or in the Special Provisions and such effect is noted by the Contractor in its estimate of the change the guarantee will be modified to the extent determined by the Board. The Contractor shall proceed promptly with all changes authorized or directed by the Owner, and approved or authorized by the Board, as provided in this Article 4; provided, however, if the Board determines that the performance of the increased work

incident to a major change will subject the Contractor to damages from the consequent delay of other work of the Contractor then under contract, the Contractor shall not be required to proceed with such additional work unless the Owner agrees to pay to the Contractor such damage costs as determined and approved by the Board.

(c) In connection with the consideration of a proposed change in the Plans and Specifications initiated by the Owner, the Owner may request (if the proposed change makes a major change in the Plans and Specifications such request shall be approved by the Board) the Contractor to submit to the Owner the Contractor's preliminary estimate of the change in cost, weight, moments and centers and delay in delivery of the Vessel which estimate shall be accompanied by a full description of the completed work which would be eliminated or would have to be modified, or acquired material which would not be used if the change is approved and of the effect, if any, of the proposed change on any guarantee of the Contractor under this contract and, if the change is a major change, the damage cost referred to in 4(b) above. Said preliminary estimate shall be submitted to the Owner within the time determined by the Board to be reasonably required for the preparation of such estimate. The Owner and the Board shall consider such preliminary estimate. Within a reasonable time the Contractor shall be directed to proceed by the Owner, as approved by the Board, or shall be advised by the Owner that the proposed change will not be directed. In the event the proposed change is not directed, and the Board determines that the change proposed was a major change in the contract work, the Contractor shall be reimbursed for the engineering and estimating costs involved, as determined by the Board.

(d) Promptly and within a reasonable time, as determined by the Board, after receipt of directions from the Owner, as approved or authorized by the Board, to make a change in the Plans and Specifications, or authorization by the Owner as approved or authorized by the Board of a change in the Plans and Specificatons, requested by the

Contractor, the Contractor shall furnish to the Owner, in writing, a statement of its detailed estimate of the net increase or decrease in the cost of the contract work and probable delay in delivery of the Vessel to result from such change.

(e) The Owner shall transmit such statement to the Board which shall consider the Contractor's statement and on the basis thereof and on the basis of such other evidence as the Board may deem relevant shall, as soon as practicable, approve or disapprove the Contractor's estimate. The Owner shall promptly notify the Contractor of the Board's approval or disapproval of the Contractor's estimate. Notwithstanding a dispute in connection with the Contractor's estimate of the cost of a change, the Contractor shall, nevertheless, proceed promptly with the work covered by such directed or approved change. One hundred and ten per cent (110%) of the net increase in estimated cost, if any, resulting from all change cost estimates, as approved or as finally determined, shall be added to the contract price as an adjustment thereof. In the event of a net decrease in contract cost in the total of all such cost estimates the Contract Price shall be reduced by the amount of such net decrease.

(f) In the event the Specifications provide a contract price dollar allowance for specified material or equipment to be purchased by the Contractor upon direction of the Owner, with the approval of the Board, such purchases shall be made in conformity with the provisions of General Order No. 37 of the Federal Maritime Board. The Contract Price will be adjusted in accordance with the provisions of this Article 4 to the extent that the total of such purchases is greater or less than the allowance provided for in the Specifications.

* * *

Article 6. LIQUIDATED DAMAGES FOR DELAY IN DELIVERY. In the event the Contractor fails to deliver the vessel on or before the contract delivery date provided in the Special Provisions, as said contract delivery date

may be extended pursuant to Article 5 of these General Provisions, the Owner and the Board will suffer damages which are difficult of ascertainment, so that it is agreed by the Contractor and the Owner and the Board that the sum set out in the Special Provisions as the per-day liquidated damages represents the damages to the Owner and the Board for each day of delayed delivery, and the Contractor shall pay to the Owner and the Board in discharge of its obligation to the Owner and the Board for its failure to deliver the vessel on the contract delivery date as such date has been extended pursuant to the provisions of this contract, as liquidated damages and not as a penalty, the said sum as per-day liquidated damages, for each calendar day or part thereof elapsing from the contract delivery date until the delivery date of the vessel. The payment of such liquidated damages shall not affect any other rights or remedies of the Owner or the Board hereunder as to matters other than the date of delivery. Such liquidated damages shall not be considered as an allowable item of cost in the determination of profit under the provisions of Article 15 of these General Provisions.

[§230:64] Article 14. GUARANTEE PERIOD — LIABILITY FOR DEFECTIVE WORK OR MATERIAL. — (a) Notwithstanding any inspection or failure to reject by the Owner or any regulatory body pursuant to Article 9 of these General Provisions, if at any time within six (6) months after the delivery of the vessel any weakness, deficiency, failure, breaking down or deterioration in workmanship or material furnished by the Contractor in performing the contract work (herein called "defective workmanship" or "defective material") shall appear or be discovered, such defective workmanship or defective material shall be made good, at the Contractor's expense, to the requirements of the Plans and Specifications and of this contract; provided, however, the Contractor shall not be responsible for the cost of correcting such defective workmanship or material to the extent that it is due to ordinary wear and tear or to the extent increased by the negligence or other improper act of the Owner or any operator of the vessel or

of any other person other than the Contractor or its subcontractors during said period. The liability of the Contractor, whether to the Owner or to the Board under this contract on account of such defective workmanship or defective material, shall not extend beyond the actual repair or replacement thereof. The Contractor shall not be liable to the Owner or the Board for any damage to such vessel or its equipment or cargo or other property of the Owner or the Board or for consequential damages of the Owner or of the Board arising out of such defective workmanship or defective material, except that in the event any defective workmanship or defective material in any item of machinery or equipment furnished by the Contractor or any defective workmanship or defective material furnished by the Contractor in the performance of work upon any of the vessel's machinery or equipment, causes any damage to such item of machinery or equipment, the Contractor shall be liable not only for the cost of correcting or repairing such defective workmanship or defective material, but also shall be liable for the cost of correcting or repairing such damage to such item of machinery or equipment caused by such defect. Any work required to be performed pursuant to the provisions of this Article 14 shall be carried out, if practicable and at the Owner's option, at the shipyard of the Contractor. The Owner may, however, have such work performed at any port satisfactory to it and in that event the Contractor shall be liable to the Owner for the expense thereof at the commercial rates prevailing in such port area, including the cost of dockage of the vessels, if necessary. Should the Contractor so desire, it may have an engineer on board the vessel for the respective guarantee period who shall have full opportunity to observe and inspect the working of the vessel in all its parts, but without any directing or controlling authority over the vessel. In computing the guarantee period from the date of the Owner's acceptance of the completed vessel there shall be excluded any time the vessel is prevented from entering or is taken out of service on account of any defective workmanship or

defective material for which the Contractor is responsible, as herein provided.

(b) The Owner shall notify the Contractor of any defective workmanship or defective material or danage for which the Contractor is liable pursuant to paragraph (a) above, discovered or appearing within the guarantee period within twenty (20) days of the end of such period or if the vessel is at sea at the end of such period within twenty (20) days of the end of the voyage. In the event the Owner proposes the repair or correction of the defect or damage before the vessel reaches its next continental United States port, notice shall be given to the Contractor within five (5) days after the discovery of the defect or damage and before repair, otherwise notice shall be given five (5) days after the vessel next reaches a continental United States port and before the defect or damage is repaired or corrected. Whenever practical (taking into consideration the necessity of keeping the vessel on schedule) the Contractor shall be given an opportunity to inspect the defective workmanship, defective material, or damage before it is remedied. The responsibility of the Contractor for defective workmanship, defective material or damages pursuant to this Article 14 shall be determined by the Owner.

(c) A final guarantee survey of the vessel shall be conducted by the Maritime Administration's Guarantee Survey Board at the expiration of the guarantee period, or as soon thereafter as the Owner shall deem practicable, but not later than six (6) months after the expiration of such guarantee period. Such survey shall be based on the defective workmanship and defective material in the contract work appearing or discovered during the guarantee period. In the event that the vessel is not available for the guarantee survey on or before the end of the guarantee period, the Owner promptly shall submit a list of all the defective workmanship and defective material in the contract work appearing or discovered during the guarantee period, to the Board with a copy to the Contractor. Such survey shall be held at such port in

the United States as the Owner designates and seven (7) days' written notice of time and place for such final guarantee survey shall be given to the Contractor by the Owner.

(d) At the end of the guarantee period herein provided, the Contractor agrees to transfer and assign to the Owner as to any item of material installed in the vessel the guarantee rights of the Contractor against the vendor of such item of material where under the terms of such vendor's guarantee the vendor's obligations extend for a period beyond the guarantee period herein set forth; provided, the Contractor may exclude from such assignment any rights against the vendor in favor of the Contractor for defects and damages within the six months' guarantee period.

Article 31. DEFAULT OF OWNER IN CONTRACT PAYMENTS. — (a) In the event that the Owner shall fail to make the payments provided to be made by the Owner to the Contractor pursuant to the Special Provisions and the General Provisions of this Contract at the respective times provided for such payments, the Contractor upon such failure of the Owner may give to the Owner written notice of such failure and a copy of said notice shall be delivered to the Board by the Contractor; provided, however, that in the event the failure of the Owner involves a matter as to which the Owner has appealed to the Board pursuant to Article 36 of these General Provisions, such notice shall not be given until after the Board's decision if the payment in question is the subject of the appeal and a written copy of said notice shall be delivered to the Board by the Contractor. The Owner shall have fifteen (15) days to make the payment covered by the notice, or such longer period as may be agreed by the Contractor and the Board upon a showing that the Owner has taken steps sufficient to remedy the failure.

(b) In the event the Owner fails after such fifteen (15) days or extended period to make the payment set out in the notice provided for in paragraph (a) above, the

Contractor may deliver to the Owner a notice of default and deliver a copy of such notice of default to the Board.

(c) Within fifteen (15) days after it receives the Contractor's notice of the Owner's default, or such longer period as may be agreed by the Contractor and the Board upon a showing that the Owner has taken steps sufficient to remedy the failure, the Board shall (i) give the Contractor written notice of its election to assume the obligations of the Owner to complete the payments required to be made to the Contractor by the Owner under this contract, or (ii) give the Contractor Notice of Optional Termination pursuant to Article 28 of these General Provisions. In the event the Board assumes the Owner's obligation to perform its obligations under this contract, the Board shall promptly pay all delinquent payments of the Owner. A copy of the Board's notice to the Contractor shall be delivered to the Owner. All rights of the Owner under this contract and all title of the Owner in the Vessel and in the contract materials shall vest in the Board as of the date of said notice. The vesting of all of the Owner's right and title as hereinabove provided is made to enable the Board to thereafter proceed in a manner it deems best, but such vesting shall be without prejudice to the rights, if any, of the Owner as between the Owner and the Board.

(d) The provisions of this Article 31 shall in no way restrict or prejudice the right of the Contractor to pursue its remedies in regard to any default of the Owner in any of the Owner's obligations under this contract other than payments to be made by the Owner.

* * *

Article 36. DISPUTES.—Any action, omission, direction, decision or determination of the Board, the Owner or the Contractor under this contract may be the subject of a

dispute. Any dispute arising under this contract which is not disposed of by agreement of the parties to this contract, shall be decided by the Chief, Office of Ship Construction, of the Maritime Administration, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor and to the Owner, which decision shall be final and conclusive and shall bind all parties to this contract unless within thirty (30) days from the date of receipt of such copy the Contractor or the Owner appeals from said decision by mailing or otherwise furnishing said Chief, Office of Ship Construction, a written appeal addressed to the Board. The decision of the Board on any question of fact, unless determined by a court of competent jurisdiction to have been fraudulent, capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence, shall be final and conclusive and shall bind all the parties to this contract. In connection with any appeal proceeding under this Article 36, the Contractor and the Owner shall be afforded an opportunity to be heard before the Board or before the duly authorized representative or representatives of the Board appointed for the hearing of said appeal and an opportunity to offer evidence in support of or in opposition to the appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract work and in accordance with the decision of said Chief, Office of Ship Construction. The fact that the Owner, with or without comment, refers to the Board as hereinbefore provided, the Contractor's estimates as to the cost and time of making changes, shall not prejudice the rights of any party to have any dispute relating thereto decided under this Article 36.

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FINAL OPINION & ORDER
(Mar. Sub. Bd., August 11, 1971)

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

—

DOCKET NOS. CA-62 AND CA-63

SUN SHIPBUILDING AND DRY DOCK COMPANY

v.

U. S. LINES, INC.

In the matter of cross appeals from a decision of the Contracting Officer concerning the fair and reasonable value of work performed by Sun Shipbuilding and Dry Dock Company pursuant to Changes Nos. 23 (centralized control of engine room and bridge control of main engine) and 48 (modification of crew accommodations) on five C4-S-64a design type vessels constructed for United States Lines, Inc. under Contract No. MA/MSB-11.

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Submitted: April 5, 1971 Decided: August 11, 1971

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FINAL OPINION AND ORDER OF THE MARITIME SUBSIDY BOARD.

—

Andrew E. Gibson, Chairman; Robert J. Blackwell, Member; and Roy G. Bowman, Alternate Member

Served Upon:

John J. Runzer, Esq., c/o Pepper, Hamilton and Scheetz, 123 South Broad Street, Philadelphia, Pennsylvania 19101 for Sun Shipbuilding and Dry Dock Company

Louis J. Cusmano, Esq., William J. O'Brien, Esq., and *John P. Geraghty, Esq.*, c/o Kirlin, Campbell & Keating, 120 Broadway, New York, New York for United States Lines, Inc.

Robert A. Garske, Esq., Staff Counsel, Maritime Administration, Washington, D. C.

INTRODUCTION.

This proceeding before the Maritime Subsidy Board ("Board") involves cross appeals by Sun Shipbuilding and Dry Dock Company ("Sun") and United States Lines, Inc. ("USL") pursuant to the disputes provision, Article 36, of the General Provisions of Contract No. MA/MSB-11 (the "Contract") from a final decision by the Acting Chief, Office of Ship Construction ("Contracting Officer"), Maritime Administration. That final decision held that the fair and reasonable value of the work Sun was entitled to recover for performing work in accordance with Changes Nos. 23 and 48 on five C4-S-64a design type cargo vessels constructed for USL amounted to $2,200,000 including profit. The cross appeals from that decision were referred to the Chief Hearing Examiner (and thereby the authorized Representative of the Board) for hearing and recommended decision. The Maritime Administration ("MarAd"), represented by Staff Counsel, has also been a party to this proceeding since the Board has authorized subsidy participation in these changes at the construction-differential subsidy ("CDS") rate of 48.6%. The proceeding is presently before the Board upon certification of the record by the Board's Representative on October 2, 1970.

This dispute essentially concerns the cost of automating these five vessels of USL, which were among the first United States-flag automated cargo vessels. Initially, under the Contract signed on October 10, 1962, for $52,950,000 these vessels were designed to be constructed as conventional vessels. Addendum No. 1 to the Contract, however, executed on February 25, 1963, increased the maximum-continuous shaft horsepower from 16,000 to 18,000, changed the engine configuration to single plane, and increased the contract price to $53,199,000. Actual automation of these vessels was directed by Change 23 which the Board approved on May 31, 1963, "based on an estimate of $300,000 per ship, the final cost thereof to be subject to adjudication . . . ." In the official notification to Sun of that action, Sun's estimate of 60 days delay in delivery of the vessels was noted. In brief, this change enabled certain control functions, most notably throttle control, to be made directly from the bridge and it centralized in a large console located on the bridge certain data, such as temperature readings, originating in the engine room.

Although automation would enable more efficient operation of these vessels the real savings to the ship operator would be realized only with concomitant crew reductions. At the time Change 23 was authorized, it was contemplated that there would be crew reductions and, most likely, consequent rearrangement of crew quarters on these vessels. However, for various reasons including negotiations with labor unions it was not until October 1, 1963, that a representative of the Contract Officer approved Change 48 based on a preliminary estimate of $38,000 per vessel and an estimated delay of work "in the affected areas of the vessel" of 90 days. Change 48 occurred when

Sun had almost completed the original general arrangement plan, resulting in the scrapping of most of that plan. It required single occupancy quarters for 12 less men and mostly entailed an engineering task to accommodate the rearranged crew quarters and changes in auxiliary equipment to those quarters. It also required significant changes to the galley and to pantry equipment.

Subsequently, due to the insistence of labor unions, USL authorized a further change in the arrangement of quarters in the first or second week of February 1964, so as to restore two of the crew members formerly eliminated.[1] This was a year and a half after contract award and only five months from the scheduled contract delivery date for the first vessel. Sun indicated in a letter dated February 14, 1964, to Friede & Goldman, Inc., USL's design agent under this Contract, that the additional cost would be approximately $5,000 per vessel with a delay of 6 to 8 weeks "in development of the area." Sun warned that the change could affect delivery of the first vessel. Five days later Sun explained that the cost estimate in its earlier letter "was a considerable underestimate" and that a revised "preliminary estimate" of costs would be forwarded. On March 13, 1964, USL was advised by telephone that Sun's preliminary estimate of $5,000 per vessel was revised to $58,000 total.

After completing work relating to automating these vessels and the other contract work, Sun delivered the five

1. The record does not reveal when USL authorized or anyone duly authorized by the Board approved this modification of Change 48, if indeed, it ever was approved and authorized or, if indeed, it required approval or authorization. No party discussed this matter in briefs before the Board. We agree that the matter is moot since it is clear from the record that Sun relied on the actions of the Contracting Officer and USL, both of whom acted as though the modification had been approved and authorized or required no approval or authorization.

vessels, Sun Hulls 628 to 632, on November 12, 1964, January 15, 1965, April 14, 1965, June 29, 1965 and September 24, 1965.[2] Since the Contract required delivery of the vessels at 75 day intervals commencing September 29, 1964, the actual delivery dates were respectively 44, 33, 47, 48, and 60 days beyond the scheduled contract delivery date for each of the five vessels.

Thereafter, Sun submitted the required detailed estimates for Changes 23 and 48. The estimates were divided into three parts relating to the basic "hardware" costs for Changes 23 and 48 respectively and to the costs of delay, disruption and other factors caused by performance of the changes. In its originally filed detailed estimates, Sun claimed a total cost of $4,738,516 excluding profit, on account of the changes. This claim was subsequently increased by $480,000 exclusive of profit prior to the Contracting Officer's final decision.

As noted previously, the Contracting Officer's final decision held that the fair and reasonable value of the work caused by the changes was $2,200,000 inclusive of profit. This decision was not rendered until August 21, 1969, nearly four years after Sun completed submittal of the detail estimates in late 1965. The processing of Sun's detailed estimates was prolonged by the following: concurrent, protracted, and inconclusive negotiations to settle this dispute; upward adjustments in the position of the Maritime Administration Staff ("Staff") on Sun's detailed estimates; frequent postponements of Staff decisions to permit Sun and USL to make additional submissions relating to the dispute; changes in the persons authorized to

2. USL's vessel bearing Sun's Hull number 629 was delivered before that bearing Hull number 628. Sun switched the hulls in August 1963 to take advantage of better crane facilities at No. 8 way.

act as the Contracting Officer; [3] and delay in the Contracting Officer's decision to allow Sun to obtain and analyze government files relating to the Staff's position on this dispute.

After the Contracting Officer's decision was finally rendered, Sun and USL appealed by letters dated September 9 and 24, 1969, respectively. Pursuant to Article 35 of the General Provisions of the Contract, these cross appeals, as already noted, were referred to the Board's Representative for hearing and recommended decision.

Lengthy public hearings were held in Philadelphia, Pennsylvania, New York City, and Washington, D. C. from December 1, 1969, to January 20, 1970. Extensive briefs on the issues were filed and oral argument by counsel for all parties was held on March 6, 1970. On June 9, 1970, the Board's Representative served a Recommended Decision in which he recommended seventeen findings and conclusions which, as calculated in a Recommended Order served July 16, 1970, would award $3,820,120 including profit, to Sun and would deny the balance of Sun's then requested claim of $6,688,893, which included profit.

USL and Staff Counsel filed Exceptions to nearly all the findings and conclusions of the Recommended Decision. USL's position is that Sun's recovery must be limited to no more than $1,954,730 while Staff Counsel's position would permit a slightly larger recovery of $2,041,429. Sun filed Exceptions only to that part of the Recommended Decision recognizing 307 days of delay in

3. The following were the authorized Contracting Officer under the Contract as Chief or Acting Chief, Office of Ship Construction for the time period Sun's detailed estimates for Changes 23 and 48 were processed: Vito L. Russo (August 13, 1965 to December 31, 1965); Ludwig C. Hoffmann (July 1, 1966 to November 27, 1967; February 24, 1969 to August 21, 1969); E. Scott Dillon January 1, 1966 to June 30, 1966; November 28, 1967 to February 23, 1969).

delivery of the USL ships caused by the changes rather than 607 delay days. Sun also requested payment of interest from USL on part of Sun's claim. Replies to Sun's Exceptions were filed by USL on September 16, 1970. Sun filed its Answer to Staff Counsel's and USL's Exceptions on September 30, 1970, and on the next day by telegram requested oral argument before the Board.

On March 17, 1971, due to the significant and complex issues involved in this proceeding the Board heard oral argument from counsel for all parties. Subsequently, the Board received certain responses dated March 26, 1971, and a reply thereto dated April 5, 1971, from Sun and USL, respectively, that were generated by discussion during oral argument.

After careful review and study of the entire record and after much deliberation, the Board, for the reasons set forth hereinbelow, adopts some of the findings and conclusions of the Recommended Decision and renders independent findings and conclusions on the remaining unsettled issues in this proceeding.

DISCUSSION

I. Basic "Hardware" Costs

Sun claimed in its detailed estimates a total of $2,094,116 and $242,518, both figures excluding profit, for basic "hardware" costs arising from performance of Changes 23 and 48 respectively. The parties have agreed to $950,000 representing the cost (without profit) of material expended in the automation change. With respect to several costs claimed by Sun to have been incurred due to the changes, no exception has been taken to their implied recommended award in full by the Board's Representative. These costs are insurance and guarantee costs for the automation change and material costs, sub-

contractor charges, and insurance costs for the quarters change. No serious effort was made by USL and Staff Counsel throughout the proceeding to contest these claimed costs and at least with regard to the guarantee costs the Contracting Officer recognized the entire $50,000 claimed. Accordingly, we accept these costs totalling $63,226 as fair and reasonable.

There remains disagreement over the labor and overhead costs associated with Changes 23 and 48 and certain other costs associated with Change 23. Specifically, the areas of disagreement are engineering labor, time and material for electrical cable installation, production labor (excluding electrical labor), service rate, overhead rate or burden, and the cost relating to the second sea trial for the first vessel. The Board's Representative recommended award of $2,099,927 for the total basic "hardware" costs.

A. *Engineering Labor or "Additional" Engineering*

In its detailed estimates Sun claimed 48,863 manhours of engineering labor were performed on the changed work as a result of Changes 26 and 48[4] and it tabulated the various plans that were modified or redrawn in the development of the changes. Under the Contracting Officer's decision only about 27,190 hours were recognized.

4. The Board's Representative and the parties in their briefs refer to Sun's claim of 40,236 (rather than 48,863) engineering labor hours caused by directly performing the changes. However, Sun's engineering labor claim is based solely on its detailed estimates (Tr. 732, 874), and a review of those estimates in Sun Exhibit 24 reveals that Sun claimed only a total of 48,863 such hours—17,025 such hours as a result of Change 23 (14,500 plus 2,475 for other design and development and a net 50 hours for supplements 1 to 4) and 31,838 such hours as a result of Change 48 (31,500 plus 338 for modification 1 and supplements 2 to 4). The error appears to have been originally made on January 13, 1970, when in the course of this proceeding Sun's position was erroneously explained as a sum of 17,525, 31,500 and 238 hours (Tr. A-1875).

In addition $163,500 (approximately 25,000 hours) of "additional" engineering was recognized, but the $163,500 was not identified as to whether it consisted of only engineering disruption to unchanged work or whether it consisted of some mixture of engineering disruption to changed and unchanged work.

The Board's Representative recommended with respect to this matter:

> "Shipbuilder's estimate of additional engineering production . . . caused by changes found reasonable except for 10% disallowance for overstatement of plans redrafted . . . ."

This recommendation was based 1) on a conclusion that at the Contracting Officer's level the Staff intended to allow Sun approximately the amount of engineering labor it claimed and 2) on a jury verdict judgment that the testimony of USL's experts that Sun's engineering labor was overstated justified reducing Sun's hardware engineering hourly estimate by 10%.

Sun and Staff Counsel take no exception to this recommendation. USL takes exception to the recommendation and claims only $81,780 should be allowed for this item. Its position is that the documentary proof established that only 230,000 total engineering labor hours were expended on the Contract rather than 280,000 hours, and consequently total engineering labor expended supported its contention that no more than $81,750 of engineering labor costs was caused by the changes. Further, USL contends that testimony of USL's experts, underestimated and misinterpreted by the Board's Representative, supports an award of $81,750.

Throughout the hearing in this proceeding it was acknowledged that a MarAd audit had established that

approximately 280,000 man-hours of engineering labor were expended by Sun under the Contract. Almost at the end of the hearing, however, USL's counsel requested, as a result of testimony of Sun's former supervisor of electrical engineering department, data processing records of engineering hours which were later identified as USL Exhibit 51-B. Sun's counsel indicated that figures in USL Exhibit 51-B totaled approximately 280,000 of engineering time; however, USL 51-B totals only about 230,000 hours.

The explanation for the discrepancy is that USL 51-B is on its face incomplete. The exhibit has no ascertainable beginning or concluding page; it has no explanation of what it purports to tabulate; and it has nothing that would indicate it is a complete document. On each page, it is stamped February 7, 1965. The last three vessels under the Contract were delivered after this date on April 14, 1965, June 29, 1965, and September 24, 1965, respectively. Therefore, it is possible that some additional engineering hours for those vessels were not recorded on USL 51-B. Further, even as of February 7, 1965, the document is patently incomplete since the hours indicated for some of the codes (notably code 38) when added, total considerably fewer hours than the sum indicated for those codes. Moreover, there is no explanation or assurance that there are not other codes that recorded engineering hours than those indicated. On this point, Sun's counsel warned: "I should add that it is my understanding that the record is neither complete in the sense it is not final, which we do not have, and that there may well be pages missing." (Tr. A-2324). Since the final records are not available, we must conclude that USL Exhibit 51-B represents only some vague, incomplete statement of the engineering hours and does not contradict the statements in the record that MarAd audit established that Sun performed approximately 280,000 engineering hours under the Contract.

USL's other contention is that the Board's Representative failed to weigh properly the testimony of USL's two independent experts on the engineering labor required by Changes 23 and 48. The experts, Norman W. Penney and Henry W. Tiedmann, examined the plans which Sun asserted were affected by the changes and calculated for each plan the fair and reasonable engineering hours required for a total of 15,158 hours. Their testimony emphasized the techniques used to reduce the redrafting effort and the plans which were either superseded by the changes or were not drawn at the time the changes were authorized and as such did not require redrafting. The testimony of these experts was corroborated by a representative of Friede & Goldman, Inc., Daniel Costello, Jr., who testified that the changes added 15,500 to 19,000 engineering hours to the Contract. On cross examination of these witnesses, it was brought out that the two experts were not apprised of relevant circumstances involved in the plan development (such as the extensive involvement of relevant regulatory bodies in the plan approval process and the conference time required by some of Sun's non-overhead engineering personnel); that one of the experts included time for drawing and supervising drawings but no time for plan approval, yard consultation, study and conference time, while the other gave a minimum of eight hours for each plan and included some time for first/level supervision; that the Freide & Goldman representative gave merely a rough estimate based upon his memory as plan approval agent and not based on a detailed review of the plans.

Sun did not attribute to each plan a set number of hours because of the problems of consultations, investigations, studies, et cetera, peculiarly troublesome under this Contract in the plan development which were in addition

to the actual drafting of plans. For this reason, it is difficult to evaluate the effect of the testimony of USL's witnesses on Sun's engineering labor claim. The Board's Representative, presented with these positions of the parties on this issue, had to exercise his judgment as to the weight to be attributed to the testimony of USL's witnesses. We are not persuaded that there is sufficient basis to set aside his recommendation that Sun's engineering labor claim for Changes 23 and 48 should be reduced by 10%. USL's witnesses were unfamiliar with the significant nondrafting problems associated with performing the changed engineering work. On the other hand, their testimony did contribute to an understanding of the amount of time drafting and supervision should have taken. We consider that the Board's Representative properly weighed this evidence. Therefore, we find and conclude that Sun is entitled to recover additional engineering labor costs incurred due to the changes, based on its claimed 48,863 man-hours, less 10% thereof.

B. *Production Labor.*

(1) *Time and Material for Electrical Cable Installation.*

According to the Board's Representative, Sun claimed in its detailed estimates approximately 135,000 hours of production labor required to accomplish Changes 23 and 48. Over half of those hours related to production labor required to install the electrical cable required by Change 23. The agreed upon calculation to compute installation costs for the electrical cables is to apply a labor coefficient (hours/footage of cable) to total cable footage. There is disagreement, however, over the labor coefficient—which in this context includes hookup of equipment, testing and calibration—and the total cable footage, which is the length of cable drawn from the shop as required by Change

23 before installation aboard the vessels. Before the Board's Representative, Sun advocated a .8 labor coefficient and 19,300 feet per vessel of gross cable footage. Staff Counsel and USL advocated a .39 labor coefficient and 17,195 feet per vessel of gross cable footage.

The Board's Representative recommended the following:

> "Dispute over time and material for electrical cable installation resolved on median basis of multiplying 18,150 feet per vessel × .6 hour labor coefficient. Jury verdict approach sanctioned by Court of Claims and Board of Contract Appeals decisions followed . . . ."

The Board's Representative reasoned that since there was disagreement among Staff Counsel and his witnesses and disagreement between Staff Counsel and Sun, and due to the "inherent nature of the dispute," the subject matter was not susceptible to precise determination without actually measuring the cable installed, which could not be conveniently accomplished. Hence, under these circumstances, the Board's Representative felt it appropriate, pursuant to relevant administrative and judicial precedent, to make a judgment determination, much as would a jury in a contract damage suit.

Sun takes no exception to the recommendation. Staff Counsel in his exceptions continues to contend for a labor coefficient and gross cable footage of .39 and 17,195 feet respectively. USL agrees with this position. Exception is also taken to Sun's use of uncorroborated estimates and to the use of the jury verdict method when there were available methods for ascertaining the labor coefficient and gross cable footage and when testimony of Staff Counsel's witnesses was not in conflict.

Based upon this record we are not convinced by the exceptions of Staff Counsel and USL that the recommendation must be set aside and their position adopted.

Staff Counsel's labor coefficient of .39 is indisputably derived from Sun's cost structures (average of 76,802 hours per vessel)[5] and testimony of Sun's witnesses on purchased cable footage used per vessel (roughly 200,000 feet). Also, indisputably the gross cable footage of 17,195 feet was derived by the usual MarAd procedure of measuring the cable to be installed as indicated by working drawings and with allowances for three dimensional movements, obstructions, etc. (12,737 feet) and applying a waste factor thereto (35% as suggested by Sun's witness).

We have several problems with this approach. It ignores conflicting evidence by the Contracting Officer that notwithstanding other testimony by MarAd witnesses he would use .6 labor coefficient (including hookup and testing) as he had done in his decision. It accepts without documentary proof the approximation by Sun's witnesses of the total purchased cable footage used per vessel. It does not take into account that the changed work was more difficult than new construction work. Finally, the method of deriving total cable footage from working plans can only be a rough estimate and, at best, accurate within a given estimating range.

On the other hand, we have problems with Sun's position of a .8 labor coefficient and total cable footage of 19,300 feet. This position was not explained or scrutinized in depth at the hearing by Sun, and Sun did not put into evidence the cutting records, from which the total cable footage was derived.

5. There is controversy, however, over the exclusion of 2000 hours of calibration, test and checkout on the console by non-electrical personnel.

Given the imperfections of both Sun's and Staff Counsel's positions, the numerous allowances involved in the estimates and the judgment involved of the difficulty and scope of the changed work, we conclude this issue is not susceptible of precise resolution. Further, it is impractical, if not impossible, to measure the electrical cable actually installed aboard these USL vessels, and even if such measurement were undertaken the controversy that has marked this proceeding to date indicates that dispute would remain over the difficulty and scope of the changed work. For the same reason we have serious doubts that any further proceeding would produce any better foundation for an award. Under Article 36 of the General Provisions of the Contract, the parties have agreed to this Board resolving disputes. Once Sun demonstrates that it is entitled to recover for a particular cost that it, in fact, incurred because of a change, we consider it our obligation, in circumstances such as these, to resolve the amount of recovery on a reasonable basis. In similar circumstances, the Court of Claims in breach of contract cases[6] and in cases reviewing appeals from the Boards of Contract Appeals[7] have used the "jury verdict method," although it is sometimes remarked that the standard is not favored and is only used when no more reliable method for computing costs or damages is available.[8]

Staff Counsel's objections to the use of the jury verdict method by the Board's Representative are based upon the asserted reliability of Staff Counsel's position on this issue

6. *E.g., Specialty Assembling Co. v. United States*, 174 Ct. Cl. 153, 184, 355 F. 2d 554, 572 (1966); *Western Contracting Corp. v. United States*, 144 Ct. Cl. 318, 336, 373 (1958).

7. *E.g., Electronic & Missile Facilities, Inc.*, 189 Ct. Cl. 237, 253, 416 F. 2d 1345 (1969).

8. *E.g., Sternberger v. United States*, 185 Ct. Cl. 528, 401 F. 2d 1012 (1968).

and the asserted weaknesses in Sun's position. We have already covered both objections and concluded that neither approach is productive of an adequately supported award, or in other words, under the circumstances there is available no more reliable method than the jury verdict method for computing these costs.

Using the jury verdict method for computing these costs, we find and conclude that as fairly as possible under these circumstances a labor coefficient of .6 and a total cable footage of 18,248 feet represents the reasonable value of performing this changed work. This resulting award for the total cable footage is roughly within the estimating range of both positions and for the labor coefficient corresponds to the judgment of the Contracting Officer which remained unchanged during this proceeding. Further, in effect, this resolution permits the previously discussed imperfections of both Sun's and Staff Counsel's positions to be offset.

(2) *Other Production Labor.*

The balance of the total hours for production labor claimed by Sun in its detailed estimates, according to Staff Counsel, approximates 50,000 man-hours. This subject concerns such matters as installation of the console, revisions in the galley, and installation of sensors. The precise total number of production hours involved is not indicated in the briefs or in Sun's detailed estimates.

The Board's Representative allowed without comment all the claimed production labor hours. Staff Counsel takes exception to this recommended award and would allow only 26,385 hours based on adjustments of the original staff evaluation of Sun's total production labor claim to reflect the positions of the Chief of the Division of Estimates, the Contracting Officer, and Staff Counsel.

USL agrees with Staff Counsel's position. Staff Counsel argues that Sun's claim was not supported by backup data or cost returns, that the Board's Representative should have given the Staff estimate some credence, and that "it may be that if ever a jury verdict approach were applicable, it might well apply here." In support of Staff Counsel's position MarAd's Assistant Chief of Division of Estimates testified on a few of the items included in production labor, specifically, the handling and installation of the console in the engine room, the installation of temperature and pressure sensors, and the installation of the fuel and cargo oil tank heating and supply return lines. The stated purpose of his testimony was to show a "great disparity" between the amount Sun claimed and the amount indicated by the evidence and more broadly to cast doubt on the credibility of Sun's entire claim.

We are persuaded upon a review of the entire record that Sun's detailed estimates of the production labor (excluding electrical labor) are fair and reasonable.

The first item to which the MarAd's Assistant Chief of Division of Estimates testified concerned production labor needed to handle and install the console as required by Change 23. Initially, he argued that Sun's estimate of 700 hours per vessel for this task was erroneous because Sun simply projected the extraordinary production labor required for the first vessel to the other four vessels. The Staff witness admitted, however, that 900 to 1000 hours was reasonable for the first vessel and Sun emphasized that the 700 hour figure was an average figure. The Staff witness then contended that the average figure per vessel should be 600 hours. On cross examination, it was brought out that this represented about a 13% difference and the Staff witness admitted this was "within the normal range of estimating." (Tr. A-1686.) Therefore, since Sun's esti-

mates are within the conceded normal range of estimating we perceive no basis to reduce Sun's production labor estimate in regard to handling and installing the console.

The next matter raised concerned the production labor involved in installing pressure sensors and gauges required by Change 23. The Staff witness' principal approach was to use Sun's credit of 20 hours per standard sensor or gauge per vessel as the appropriate labor charge for installing the new pressure gauges and sensors required by Change 23 and therefore urged that Sun's estimate of 61 hours per senior or gauge or 1100 hours total be reduced to 360 hours. Sun's rebuttal witness, its Machinery Superintendent, who was present when the new gauges and sensors were installed, effectively refuted the premise that work related to installing the credited standard gauges or sensors was comparable to work related to installing the gauges and senors required by Change 23. The standard gauges and sensors weighed about half a pound, were mounted on a common board, and required little, if any, foundation. But the sensors and gauges required by Change 23 weighed 20 to 30 pounds, required elaborate foundations and shielding and needed ready access for regular calibration. It is obvious, therefore, that the Staff (and Staff Counsel) were estimating installation costs for different sensors and gauges than required by Change 23.

Staff Counsel in its post hearing brief raised another issue on this matter as a result of testimony of Sun's rebuttal witness. A question was directed to Sun's rebuttal witness of the relative cost of installation of the special sensors and gauges required, as compared to those originally specified. The witness replied, "twice as much time just the time spent on mounting and foundation and welding, et cetera." (Tr. A-2346.) Since 20 hours were estimated for installation of each original sensor or gauge Staff

Counsel argued this testimony indicated 40 hours for such installation rather than the 61 hours claimed in Sun's detailed estimates. We are not persuaded the testimony concerned conflicts with Sun's detailed estimates. Sun's rebuttal witness principally testified on the technical requirements for installation of the different sensors and gauges with which he was most familiar. The record is silent with respect to his familiarity with or expertise in estimating the cost of such installation. His response to the question of the cost of installation was certainly not a precise answer, and it is uncertain whether it had reference to the total installation cost or to "just the time spent on mounting and foundation and welding, et cetera." Under these circumstances, it can at best be said, that the witness giving a very rough estimate of the console installation time involved and that he was not attempting to state with precision Sun's claim. Accordingly, we find no basis from the foregoing to reduce Sun's claim in regard to installation costs for certain sensors and gauges.

The final matter raised involved Sun's claim for production labor for installing fuel oil heating steam supply and steam condensate returns. The Staff witness argued that the credit involved in not installing the steam supply and condensate returns as originally specified should be increased because Sun in its detailed estimate stated that originally the condensate returns were to run on the exposed main deck whereas according to the original specification the lines should have been run "through the cargo spaces . . . through brackets to afford protection." However, since there were no such brackets for these ships the original specification was admittedly ambiguous. Friede & Goldman who drafted the specification stated the specification permitted "overdeck runs." The Staff witness acknowledged this interpretation was reasonable though he

contended "the tank level *may* be considered as a deck in shipbuilding terminology." (Tr. A-1681. Emphasis added.) While the tank top may be considered a deck, it is undisputed that the main deck is a deck. Sun so interpreted Freide & Goldman's understanding of their specification. We consider that that interpretation by Sun is reasonable.

Based on the foregoing discussion of selective contested elements of Sun's claim for production labor hours (excluding electrical labor), we find and conclude that Sun is entitled to recover for these elements of its claim. Further, since Sun has presented detailed estimates of the remaining elements of its claim which have not been seriously questioned by USL or Staff Counsel other than by certain exhibits that were not explained or scrutinized in depth at the hearing, we find and conclude that Sun is entitled to recover its entire claim for production labor (excluding electrical labor) resulting from performance of Changes 23 and 48.

(3) *Service Rate*

Production labor hours are used as a basis for calculating the cost of Sun's services. Sun's services cover lighting, crane service, cleaning time, material handling, and transportation. "Traditionally," MarAd and Sun have agreed to a 10% service rate. That rate was applied to all other change order settlements under the Contract which were relatively minor. As a part of adjudicating Sun's detailed estimates for Changes 23 and 48, and apparently after settlement of other change orders under the Contract, it was determined that Sun actually experienced a 7½% service rate on this Contract.

The Board's Representative recommended the following with respect to this matter:

> "Service rate computed at 10% of direct labor traditionally allowed by MarAd authorized rather than 7½% Staff recommendation . . . ."

He reasoned that since Staff Counsel had not addressed himself to this matter in post hearing briefs and since the matter was not litigated in depth at the hearing, Sun's statement that the 10% rate was traditionally allowed was unchallenged.

Staff Counsel and USL take exception to this recommendation, arguing that the service rate of 7½% established by MarAd audit of Sun's records and actually experienced by Sun under the Contract is the fair and reasonable service rate figure.

As between a traditionally allowed service rate and a service rate established by audit for this Contract, the latter must be allowed in determining the cost Sun is entitled to recover for *actual* work caused by Changes 23 and 48. Sun has presented no other arguments why the audited rate should not be allowed and we know of no reason why it should not be permitted. We note that the audited data as presented in Staff Counsel's Exceptions would indicate a service rate of less than 7½% but that it did not account for service hours expended during the outfitting period. When these service hours are taken into account, a service rate closer to 7½% is indicated. We, therefore, find and conclude that Sun is entitled to recover its changes-caused production labor costs based on a 7½% service rate.

C. *Overhead Rate*

Sun's overhead rate or burden is a ratio of indirect expenses to total direct engineering and production labor expenses. The overhead rate established by MarAd audit for the Contract averaged slightly under 72%. Apparently,

prior to that audit MarAd had agreed to a 75% overhead rate and had settled all other change orders under the Contract (which were relatively insignificant) on that basis.

The Board's Representative recommended the following on this issue:

> "Overhead for changed work allowed at 75% of direct labor, the rate previously established on other settled changes, rather than 72% average of entire contract including unchanged work . . . ."

The basis for this recommendation was that due to the complexity and novelty of the automation change and the extensive reworking involved in the successive quarters changes the changes required significant management involvement and "skull" sessions over a long period of time, justifying the higher burden. Further, it was reasoned that the 72% average rate was insufficient compensation for overhead expended on changed work alone and, therefore, the Staff was not justified in commingling changes costs with costs for unchanged work. Finally, the Government was rebuked for putting Sun in a position of receiving a larger allowance for settling a dispute than it would receive if it had litigated." USL was understood to have expressed willingness in its written presentation to pay the 75% rate.

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9. The concern of the Board's Representative over the Staff's willingness to concede a greater overhead rate for settlement purposes than for formal adjudicating purposes is difficult to follow. The Staff may have a multitude of good and sufficient reasons for settling a matter that are not entirely related to its position for "litigating" purposes, including, of course, the hazards of "litigation" itself. Naturally the Staff should, in its unbiased, independent, and fair judgment, have a sound, reasoned basis for formally adjudicating a matter.

Staff Counsel and USL take exception to this recommendation stating that the basis given for the recommendation is irrelevant to the concept and function of the overhead rate. Staff Counsel argues that Sun's overhead rate is calculated by placing into an overhead pool all indirect expenses such as salaries of high level management and conference time of supervisory personnel and then allocating the overhead pool 100% to all contracts in the yard for a given time period based on their respective total direct labor incurred for that period. Hence, it is argued, to allow more than the actual overhead rate would be to permit Sun to recover more than 100% of the overhead expenses. As for the commingly of changed and unchanged work in the 72% average rate it is contended that Sun does not segregate overhead costs on a changed work basis and that the very use of an overhead rate is confirmation of that fact. Therefore, any distinction between overhead costs for changed versus unchanged work would make no sense at all. USL adds a denial of ever having expressed willingness to pay a 75% overhead rate.

We are persuaded that Sun is entitled to recover its costs based on a 72% burden rather than a 75% burden. Further, we find that the 72% rate most probably reflects a higher than the normal rate experienced on the unchanged contract work.

Staff Counsel has pointed out that Sun's overhead rate is calculated by pooling all indirect expenses and allocating them to all work in the yard for a given time period based on the amount of total direct labor incurred. More specifically, the 72% rate established by MarAd audit on this Contract was computed from ratios of direct and indirect labor expenses experienced in all the shops in Sun's yard for 1963, 1964 and 1965. Significantly, all shops are included in this process even though the rocket

fabrication shop handled no new vessel construction work and even though most of the other shops handled work in addition to new vessels. Further, the shops are taken as an aggregate with no division between work for vessel construction and other work. Sun's accounting practice during this period did not permit further breakdown on the composite overhead rate. Hence, the relationship between the 72% rate and new vessel construction work, let alone work under this Contract, is difficult, if not impossible to ascertain. The only evidence on the relationship of the 72% rate and the rate for contract work was testimony by MarAd's Chief of the Audit Branch in the Eastern District that the overhead rate on contract work was possibly closer to 70%.[10] Under that view, the 72% rate includes compensation for more overhead expenses incurred on changed work than unchanged work. In any event, it makes no sense to award a higher overhead rate for changed work than for other contract work, in this instance, because the very concept of an overhead rate, as used by Sun, is to permit allocation of overhead expenses, such as those incurred in performing the changed work, that are not susceptible with any fair degree of accuracy or reasonableness to direct allocation. Moreover, if in fact there were more indirect expenses expended for changed work, the continuing overhead portion would be recouped through Sun's unabsorbed overhead claim, since under that claim Sun recovers its total continuing overhead expenses incurred in performing the entire contract work during the changes–caused delay period less those continuing overhead expenses reflected in the 72% overhead rate on the changed work.

10. Tr. A-2228. Sun argued that a 75% rate represented the increased overhead expenses for the changed work, but it presented no testimony developing this point and it neither stated nor explained this position in the context of the composite overhead rate.

As for MarAd's use of an estimated 75% overhead rate to settle change orders under this Contract prior to fixing the actual rate, the overhead rate Sun actually incurred under the Contract may be more *or less* than the estimate of that rate. Once the actual overhead rate was established there is no authority to award Sun the estimated rate. Accordingly, we find and conclude that Sun is entitled to recover a 72% overhead rate on the direct labor performed in the changed work required by Changes 23 and 48.

D. *Other Costs–Second Sea Trial.*

The only other contested basic hardware costs claimed by Sun is the cost of pierside testing and the second sea trial of the first vessel to be delivered.

The Board's representative recommended the following:

> "Cost of second sea trial allocated two-thirds to automation change and one-third to single plane engine addendum . . . ."

Sun and Staff Counsel take no exception to this recommendation. USL's sole objection is that such allocation is in direct conflict with Article 11 of the General Provisions of the Contract which provides that "All expenses of such trials . . . shall be borne by the Contractor."

Article 11 covers "trials and tests provided in the Plans and Specifications, in the Special Provisions, and in these General Provisions" and is intended to assure compliance with those contractual terms. But, when a change is authorized which necessitates additional expense for trial and test, Article 4(a) of the General Provisions of the Contract, which provides for recovery of 110% of the estimated cost of changed work, would include recovery of the

expense allocable to the extra trials and tests required by the change. Therefore, we are of the opinion that Article 4(a) is controlling in this circumstance where the pierside testing and second sea trial primarily resulted from the automation change. Since no exception is taken to the two-thirds/one-third allocation we adopt the above recommendation of the Board's Representative on this issue.

I. Delay Associated Costs—Legal Issues.

Sun in its detailed estimate separately claimed certain costs other than basic hardware costs (referred to hereinafter as "delay associated costs" for convenience of identification) which it asserted were incurred in performance of the *unchanged* work by reason of Changes 23 and 48. These delay associated costs are delay costs (labor and material escalation, financing, services, insurance, and "unabsorbed" overhead costs) and disruption, congestion, "hire-fire" or layoffs, and acceleration costs. All of these types of delay associated costs are sometimes referred to as "indirect" or consequential costs. USL, but not Staff Counsel, takes exception to the recommendation of the Board's Representative that as a matter of law the *Rice* doctrine does not apply to the changes clause of this Contract and that under this Contract delay associated costs may legally be recovered. Additionally, USL and Staff Counsel take exception to the recommendation of the Board's Representative that as a matter of law Sun can recover any "delay" costs allegedly incurred prior to the scheduled contract delivery dates.[11] The exceptions

11. Staff Counsel encompasses within such "delay costs" only those costs referred to herein as delay costs. USL's position, however, on the *Rice* doctrine and cases applying that doctrine draws no distinction between such delay costs and disruption, congestion, and other costs which may have been incurred prior to the scheduled contract delivery dates.

taken to the factual recommendations of the Board's Representative with respect to delay associated costs are considered in Parts III and IV.

A. *The "Rice" Doctrine.*

The *Rice* doctrine has developed out of four Supreme Court cases [12] and their application and most particularly *United States v. Rice.* In that case, the Supreme Court held that a contractor was not entitled to recover certain costs arising from delay caused by the Government because the "changes clause" contained in that contract was not broad enough to include damages for delay. In *Rice,* the respondent was a contractor who had agreed to install plumbing, heating and electrical equipment in a Veterans' Home to be constructed by another contractor. When unforeseen conditions were encountered, it became necessary for the Government to stop the work of the general contractor while changes were being prepared and ordered. During the period of delay, the respondent was unable to proceed with the plumbing, heating and electrical work. This delay resulted in increased overhead costs for respondent. The Supreme Court held that the respondent was only entitled to an extension of time for the performance of his contract and that he could not recover his costs arising from the delay.

The Court recognized that recovery was dependent upon the rights of the parties as set forth in the contract in question. It stated:

> "If there are rights to recover damages where the Government exercises its reserved power to delay,

12. *United States v. Howard P. Foley Co.,* 329 U. S. 64 (1946); *United States v. Rice,* 317 U. S. 61 (1942); *H. E. Crook Co. v. United States,* 270 U. S. 4 (1926); *Chouteau v. United States,* 95 U. S. 61 (1877).

they must be found in the particular provisions fixing the rights of the parties." (317 U. S. at 66)

The changes clause in the *Rice* contract provided that if a change caused "an increase or decrease in the amount due under this contract, *or* in the time required for its performance, an *equitable adjustment* shall be made . . . ." (Emphasis added.) The Supreme Court interpreted that language to mean that

> "'an increase or decrease in the amount due' should be met with an alteration of price, and that 'an increase or decrease . . . in the time required' should be met with alteration of the time allowed; for 'increase or decrease of cost' plainly applies to the changes in cost due to the structural changes required by the altered specifications and not to consequential damages which might flow from delay taken care of in the 'difference in time' provision." (317 U. S. at 67)

The legal principle enunciated in the *Rice* case—that "an increase . . . in the time required" for completion which is caused by a change under a contract should be met only "with alteration of the time allowed" and not with a cost adjustment—has been followed and applied by the Court of Claims,[13] the Boards of Contract Appeals,[14] and the Comptroller General.[15] Commentators have frequently criticized the doctrine as leading to harsh and unfair results by ignoring the effect of delay on the cost of performance.[16] The doctrine does not apply to situations involving breach of contract by the Government or unreasonable delay caused by the Government,[17] neither of which situation is herein involved. In two fairly recent cases, *Paul Hardeman, Inc. v. United States*, 406 F. 2d 1357 (Ct. Cl. 1969); and *Electronic & Missile Facilities, Inc. v. United States*, 416 F. 2d 1345 (Ct. Cl. 1969), the Court of Claims further distinguished the *Rice* doctrine by permitting recovery of disruption to unchanged work and cost of labor inefficiency, respectively, arising from delay caused by changes or changed conditions on the basis that in those cases such costs "were the direct and necessary result of the change."[18] Hence, even though the *Rice* doctrine continues to be viable law some recent cases permit recovery of delay associated costs if they "were the direct and necessary result of the change."

As the *Rice* doctrine applies to this dispute and to MarAd shipbuilding contracts, the Board's Representative recommended the following:

> "*Rice Doctrine* held not applicable to changes clause in MarAd shipbuilding contract due to language dif-

13. *E.g., John McShain, Inc. v. United States*, 412 F. 2d 1281 (Ct. Cl. 1969); *Jefferson Constr. Co. v. United States*, 392 F. 2d 1006 (Ct. Cl.), *cert. denied*, 393 U. S. 842 (1968).

14. *E.g., Murray-Sanders & Associates*, ASBCA No. 6873, 1962 BCA par. 3408; *Peter Kiewit Sons' Co.*, IBCA No. 405, 65-2 BCA par. 5157; *Wilkins Co., Inc.*, BAACAB No. 16, 66-13, 65-2 BCA par. 5242; *Terminal Constr. Corp.*, CSBCA No. 2693, 68-2 BCA par. 7284, *aff'd on reh.*, 69-1 BCA par. 7426.

15. *E.g.*, Comp. Gen. Dec. B-161179 (Aug. 7, 1967 (Unpublished) (standard form 23A construction contract-*Rice* prohibits

15. (Con't.)
recovery of costs attributable to delay in *work which was not changed* but permits such recovery with respect to delay in *work which was changed*).

16. *E.g.*, Shedd, *The Rice Doctrine and The Ripple Effects of Changes*, 32 Geo. Wash. L. Rev. 62, 69 (1963); Nash & Cibinic, *The Changes Clause in Federal Construction Contracts*, 35 Geo. Wash. L. Rev. 908, 937-38 (1967); Note, *The Rice Doctrine After Twenty-Five Years: Bloody But Unbowed*, 39 U. Colo. L. Rev. 533 (1967).

17. See *Laburnum Constr. Corp. v. United States*, 325 F. 2d 451, 458, 103 Ct. Cl. 339, 350 (1963).

18. In *Electronic & Missile Facilities* the Court of Claims reversed the ASBCA on this very point. ASBCA No. 9866, 66-1 BCA par. 5307, at 24,953.

> ferences, the rule of construction that ambiguities in contracts are construed against the draftsman, and the FMC [*sic*] policy continued by MarAd recognizing delay, disruption and rip-out as foreseeable and legitimate costs of changes under contract . . . ."

Only USL takes exception to this recommendation arguing that the *Rice* doctrine bars recovery of "consequential delay costs to unchanged work," that the *Rice* doctrine is applicable to this Contract, that Articles 4, 5 and 8 of the General Provisions of this Contract clearly indicate that recovery of delay associated costs is not intended, that the Federal Maritime Board policy was adopted for reasons other than recognition of delay associated costs and that MarAd's and Sun's prior interpretation of the Contract is irrelevant inasmuch as it was not communicated to USL.

We are persuaded by the decision of the Board's Representative and the presentation of Staff Counsel and Sun that the *Rice* doctrine is not controlling for MarAd shipbuilding contracts such as herein involved.[19] As recognized by the Supreme Court in *Rice* and subsequent cases developing and applying the *Rice* doctrine, whether the costs in question are recoverable is determined by contractual interpretation. As noted hereinabove, the changes clause in the *Rice* contract provided that if a change causes

> "an increase . . . in the amount due under this contract, or the time required for its performance, an equitable adjustment shall be made . . . ."

The changes clause of the MarAd Contract, Article 4, provides in part:

19. Because of this conclusion, we need not decide whether the precedents of *Hardeman, supra, and Electronic & Missile Facilities, supra,* are controlling in this instance and whether under those cases the cases incurred to unchanged work claimed herein by Sun were under the facts of this dispute "the direct and necessary result of the change[s]."

> "(c) [With respect to any changes proposed by the Owner] the Owner may request . . . the Contractor to submit to the Owner the Contractor's preliminary estimate of the change in cost, weight, moments and centers and delay in delivery of the Vessel . . . ." [and]
>
> "(d) Promptly and within a reasonable time . . . after receipt of directions from the Owner . . . to make a change in the Plans and Specifications . . . the Contractor shall furnish to the Owner, in writing, a statement of its detailed estimate of the net increase or decrease in the *cost of the contract work* and probable delay in delivery of the Vessel to result from such change." (Emphasis added.)
>
> "(e) [Thereafter] . . . One hundred and ten per cent (110%) of the net increase in estimated *cost,* if any, resulting from *all change cost estimates,* as approved or as finally determined, shall be *added* to the contract price as an adjustment thereof." (Emphasis added.)

Articles 5 and 6 of the General Provisions of the Contract, respectively, provide for extension of time and liquidated damages for unexcused delay in delivery. The important differences between the MarAd Contract and the *Rice* contract and cases following the *Rice* doctrine is that 1) whereas the latter provides for an *equitable* adjustment in terms of cost *or time* for a change, the MarAd provision provides *only* for an adjustment in terms of cost and 2) the cost adjustment in MarAd contracts is founded on change cost estimates which detail the net increase or decrease in the "cost of the contract work" and not just the changed work.

USL retorts that it matters not at all whether the cost adjustment and time extensions are in the same or different provisions or even if there is a time provision because under the *Rice* doctrine there must be a specific provision for recovery of consequential delay costs.

We are persuaded, however, that even if specific language must be incorporated in a change clause to permit recovery of delay associated costs that Article 4 of MarAd contracts such as this Contract expressly and positively permits such recovery in providing only for a cost (not "equitable") adjustment based on the change in cost of "the contract work." We acknowledge, of course, that the language is not so pristine clear as to prevent any and all arguments to the contrary, but we consider that this interpretation is the plain meaning of the words involved.

This interpretation of Article 4 of this and other similar MarAd shipbuilding contracts has been consistently applied and has been, to our knowledge, virtually unchallenged until this present dispute. Thus, countless settlements of change disputes under these contracts have included recovery for these types of costs with the exception of pre-contract delivery date delay costs, which will be discussed *infra*. A further indication of this consistent acceptance of this interpretation of MarAd's changes clause is the policy of the Federal Maritime Board from November 1960 limiting construction-differential subsidy participation in major changes not resulting in an advance in the art of vessel construction to the cost based on the change having been included in the original bid at the time of contract award.[20] In explaining this policy in 1964 this

20. This policy was instituted by a letter dated November 3, 1960, from the Federal Maritime Board to the Committee of American Steamship Lines. The present policy on CDS participation under which Changes 23 and 48 were considered appears in 46 C. F. R., Part 251, Appendix No. 1 (see 30 F. R. 11756). It provides for full subsidy participation under certain criteria including

Board stated in a published Final Decision [21] that among the problems of vessel construction changes subject to subsidy participation is that:

> "Disruption, delay and rip-out necessarily accompany changes directed in the latter stages of construction and have the effect of substantially increasing the ultimate cost of the vessel."

A final indication of consistent Agency interpretation of this contract clause is the Staff position throughout this dispute recognizing some engineering disruption and some delay costs.

USL argues that MarAd's prior interpretation of the Contract, unknown to USL, and Sun's and Staff Counsel's *ex post facto* characterization of the Contract are totally irrelevant. Assuming USL's lack of knowledge of MarAd's interpretation, USL's argument is still inapplicable. MarAd's and Sun's interpretation comports with the plain meaning of Article 4 and that interpretation is available to all who have knowledge of the Contract. A subjective personal interpretation of the Contract, however, by any party, including USL, is irrelevant.

USL also argues that Article 4(b) supports their contention that delay associated costs are not recoverable under the Contract. Article 4(b) provides that the contractor is not required to proceed with a major owner-

20. (Cont'd.)
generally changes that are "necessary to optimize the economic utilization of mechanization and labor saving equipment with the potential of reducing operating-differential subsidy (ODS)." Subsidy participation limited to the original bid basis is restricted to where the subsidy participation is approved only on the basis that with reasonable certainty the added investment will produce a return to the owner of at least 10 percent per annum after taxes over the life of the investment.

21. *American Export Lines, Inc.—Contract Appeal*, 5 S. R. R. 343 (1964).

directed change unless the owner agrees to pay "damages from the consequent delay or other work of the contractor then under contract . . . ." USL contends that by expressly limiting recovery of these consequential delay costs to the "other work of the contractor," this Article indicates that recovery of delay costs to the work of the subject contract is not intended. We do not, however, read this provision as a limitation on recovery of delay costs for work performed under the Contract. Article 4(b) specifically provides for recovery of delay costs for other work of the contractor because such costs would clearly not be recoverable under Article 4(e) as increased costs of performing this Contract.[22]

We, therefore, find and conclude that because of the differences in language between the contract in *Rice* and cases following *Rice* and the instant Contract, the *Rice* doctrine is not applicable to MarAd shipbuilding contracts such as this Contract and does not bar recovery of delay associated costs.

B. *Entitlement to Pre-Contract Delivery Date Delay Costs*

Probably the most important legal issue presented in this dispute is whether Sun is entitled to changes-caused "delay" costs incurred prior to the scheduled contract delivery dates (referred to herein as "pre-contract [or

22. USL attempts to raise another argument under Article 4(c). It, however, misstates that that Article requires certain contractor's estimate of delay to its other work to be in terms of cost, but its estimate of delay to the work under the subject contract to be in terms of delay in delivery of the vessel. In fact, Article 4(c) requires that such contractor's estimate for its "other work" be in terms of "the damage cost referred to in 4(b) above" and that the estimate for work under the subject contract to be in terms of "the change in cost . . . and delay in delivery of the Vessel." Further, since Article 4(b) is concerned with work other than the subject contract it concerns only damages and obviously not an extension of time.

precontract] delivery date delay costs"), if Sun can sustain the burden of proving that but for the changes it would have delivered the vessels before the delivery dates provided in the Contract. Assuming that pre-contract delivery date delay costs are recognized as "delay" costs notwithstanding they occur prior to scheduled contract delivery dates, such costs are only a specialized form of delay associated costs and as such the preceding discussion on the *Rice* doctrine would *a fortiori* apply to these costs. However, because of the special nature of these costs occurring prior to the scheduled contract delivery dates separate legal issues on entitlement are raised.

The Board's Representative recommended with respect to this issue that

> "Where the contract calls for vessel delivery upon completion and testing after five days notice to the Owner Shipbuilder is entitled to recover established delay associated costs under the changes clause even though arising before scheduled contract delivery dates . . . ."

His discussion of the issue shows that besides the contract language and its interpretation by MarAd he was influenced by certain rules of contract interpretation and by certain peculiar facts surrounding this Contract which are set forth hereinbelow.

USL and Staff Counsel take exception to this recommendation and argue that as a matter of law Sun is not entitled to recover such delay costs for the period between the dates Sun would have delivered the USL vessels but for the changes and the original scheduled contract delivery dates.

We find this issue intrinsically difficult to resolve. On the one hand, there are the following strong arguments for denying recovery:

1. *Logic and Policy*—In submitting bids to perform contract work within a given length of time and no later than the scheduled contract delivery dates, shipbuilders agree to bear all costs that might be incurred in performing the contract work (including any changes work) until the scheduled contract delivery dates. MarAd and USL have a unilateral right to impose changes that produce no recoverable delay costs until after the scheduled contract delivery dates. The incentive to delivery early is unaffected by this approach because the yard has its facilities and manpower available earlier for other work. A contrary result would dilute the authority to issue change orders and would create havoc in determining the low responsive bidder. Neither MarAd nor the owner would be able to determine which bid is really lowest because they would not know what the subjective intent of the bidder is with respect to early delivery. On the other hand, if a contractor is basing his low bid on the possibility of early delivery, he can expressly make the early delivery date an element of the bid and thereby accept the risk of failing to meet the early delivery date.

2. *Contract Theory*—Article 1(b) does not provide a contractor a "right" to deliver early. It merely provides an inchoate right to deliver early after performance of "contract work," including work resulting from change orders. This is confirmed by Article 13 of the General Provisions of the Contract which provides that the Owner shall accept a vessel if, after requisite trials, ". . . the requirements . . . of the Special Provisions, these General Provisions and the Plans and Specifications and *changes thereto* have been met . . ." (Emphasis added.) Article 4(e) when read in

conjunction with Articles 1(b) and 13 does not authorize recovery of pre-contract delivery date delay costs. Article 4(e) provides for recovery "of the net increase in estimated cost," namely the net increase "in the cost of the contract work." Under Articles 1(b) and 13 the "contract work" is inclusive of work resulting from changes and no right to early delivery attaches until after performance of the non-changed contract work and performance of the work resulting from changes. If the work resulting from the changes extends until the scheduled contract delivery dates or thereafter the right to early delivery never arises. In other words, under the Contract the "contract work" is not increased, within the meaning of Article 4 and on the basis of the contractor's bid for the Contract, in the situation of work resulting from a change extending the time for completion of the Contract at least to the scheduled contract delivery dates. In that situation there has only been a frustration of the contractor's *plans* to deliver early. Moreover, to permit recovery under this fixed price Contract would create an inequality in mutuality; the yard would have the unexpressed and unspecified right to early delivery but no obligation and no penalty for failing to do so. The owner, on the other hand, could only make plans and commitments in the expectation of an early delivery date at his peril.

3. *Precedent*—There is no precedent to support such recovery. In the context of the *Rice* doctrine and possibly of broader applicability, *United States v. Blair*, 321 U. S. 730 (1944), which has not been overruled, denied such recovery based on lack of explicit language in the contract to cover such costs. In that case, the Court said:

"The Government and respondent covenanted that the construction work would be completed within 420 days . . . . They cannot be said to have executed these contracts in contemplation of the then unrevealed intention of respondent to complete his work three and one-half months early. The fact that respondent subsequently gave notice of this intention to all the other parties concerned could not give rise to a new obligation on the Government to compel accelerated performance from Redman.

Respondent had the undoubted right to finish his construction work in less time than the stipulated 420 days, but he could not be forced to do so under the terms of the contract. To hold that he can exact damages from the government for failing to cooperate fully in changing the contract by shortening the time provisions would be to imply a grossly unequal obligation. We cannot sanction such liability without more explicit language in the contract."

4. *Circumstances of this Contract*—USL and MarAd did not learn of Sun's expected early delivery date at the time of bidding on this Contract or at the time of award of that Contract. Sun did not apprise USL or MarAd of these costs at the time issuance of these changes was being discussed. Further, heretofore such costs have not been recognized and USL and MarAd had no basis to expect such costs. Moreover, Sun's proof consists of back-tracking from actual delivery dates or of relying on very broad estimates or schedules drawn up as a management technique to spur production.

On the other hand, strong arguments have been presented by the Board's Representative and Sun that would permit recovery:

1. *Logic*—These costs occur because of the passage of time and are the direct consequence of the delay induced by the changes; the daily costs of delay are the same whether occurring before or after scheduled completion date. Therefore, these costs, as costs directly related to the changes, should be compensable under Article 4 of the contract. Moreover, recovery would allow equal treatment where there is a delay induced by a change for a contractor who would have delivered early and a contractor who would have delivered on the contract scheduled dates.

2. *Contract Theory*—Article 4(e) of the General Provisions of the Contract provides that "One hundred and ten per cent (110%) of the net increase in estimated cost, if any, resulting from all change cost estimates, as approved or as finally determined, shall be added to the contract price as an adjustment thereof." This clause broadly permits recovery of costs incurred by reason of a change and does not preclude award of pre-contract delivery date delay costs. As for the scheduled delivery dates, these only established the outside limits of delivery for liquidated damages purposes. They do not prescribe a right to early delivery and do not support the concept that the yard is leased for a definite time period. Article 1(b) of the Contract's Special Provisions refutes such interpretations by its provision that, upon five days notice after vessel completion, the owner must accept delivery.

3. *Precedent*—While there is precedent to support award of such costs in the event of a breach of contract or unreasonable delay, it has not been decided whether

such costs are recoverable in the absence of either event. However, the reasoning of the Court of Claims in *Metropolitan Paving Co. v. United States,* 325 F. 2d 241 (1963), a breach of contract case involving pre-contract delivery date delay, appears to be pertinent. The Court stated:

> "While it is true there is not an 'obligation' or 'duty' of defendant to aid a contractor to complete prior to completion date, from this it does not follow that defendant may hinder and prevent a contractor's early completion without incurring liability. It would seem to make little difference whether or not the parties contemplated an early completion, or even whether or not the contractor contemplated an early completion." (325 F. 2d at 242).

Logically, it is difficult to distinguish the situation where pre-contract delivery date delay is due to unreasonable conduct on the part of the Government and the situation where the Government and shipowner exercise their right to unilaterally order changes without the consent of the contractor which results in pre-contract delivery date delay and the contractor is entitled to recover "the increase . . . cost of the contract work."

4. *Circumstances of this Contract*—According to Sun, its bid for this Contract was low and was based on the expectation of early delivery in order to be profitable. Sun scheduled its work accordingly and alleges to have had the capacity to follow that schedule or some other that would have produced early delivery but for the changes.

After considering these arguments on both sides of the issue, it is our opinion and we find and conclude that these costs are legally recoverable. There seems little doubt that these costs are incurred and that a bid predicated on early delivery does not cover these costs. Conceptually, insofar as incurrence of costs, there seems little difference between delays before or after the scheduled contract delivery date, as has been recognized thus far in cases relying on breach of contract or unreasonable delay. *United States v. Blair, supra,* is distinguishable.[23] Moreover, the Contract in Article 1(b) of the Special Provisions expressly permits early delivery and in Article 4 of the General Provisions recognizes "the increase in the cost of the contract work . . . to result from such change" and as such expressly provides for recovery of these types of early delivery delay costs. We consider increased work resulting from changes to be obviously an increase in the contract work within the meaning of Article 4. We are not persuaded that permitting entitlement to these costs will result in inexorable difficulty in determining the lowest responsive and responsible bidder.

We would caution, however, that because of the problem of mutuality, the problem of notice of the early delivery date to the parties concerned, and the problem of proof of that date, such costs can only be recoverable in appropriate cases where very strong proof is offered of such early delivery date. By a strong showing of proof we intend something more than self-serving schedules of a yard. Possibly corroboration by independent experts, acknowledgement by the owner and MarAd or substantial,

23. *Blair* is distinguishable either on the ground that it merely applied the language of *Rice* to a substantially similar contract, which differs materially from the instant Contract, or on the ground that the *Rice-Blair* rule is limited to cases where the delay is due to "factors outside the Government control." *Laburnum Constr. Corp. v. United States,* 325 F. 2d 451, 458 (Ct. Cl. 1963).

reasonable actions on the yard's part in reliance on such date would constitute such proof. Also, bearing on the question of proof would be the extent to which the parties affected were apprised prior to issuance of the change that such costs would be levied against them as part of the cost of the change order.

Since we have determined that there is no broad legal bar to recovery of delay associated costs Sun claims it incurred as a result of Changes 23 and 48 we turn to the issue of whether Sun has sustained its burden of proof that it did in fact incur such costs and did incur them to the extent claimed.

III. Delay Associated Costs—Delay Costs.

The delay associated costs considered herein are delay costs and certain other costs incurred in performing unchanged work due to the changes. The delay costs claimed by Sun in its detailed estimate for the changes were labor and material escalation, financing, services, insurance, and unabsorbed overhead. The Board's Representative recommended award of $871,037, exclusive of profit, for these costs. Of this recommended award, agreement was reached only with respect to the cost of insurance caused by the changes ($15,378 exclusive of profit). Further, no exception has been taken to the recommendation that Sun's claimed financing costs were included in the unabsorbed overhead claim. Some issues remain, however, concerning these financing costs. With respect to each of the other delay costs no agreement was reached on the amount Sun is entitled to recover.

(A) *Factual Findings of Delay in Delivery.*

The exact sum for which Sun is entitled to recover for each of the delay costs requires a determination of the

exact number of days of delay in delivery of the USL vessels caused by the changes. Sun claims and the Board's Representative recommended that Sun would have delivered the USL vessels prior to the scheduled contract delivery dates but for Changes 23 and 48. Therefore, we must determine whether there was pre-contract and/or post contract delivery date delay caused by the changes.

(1) *Pre-Contract Delivery Date Delay.*

The Board's Representative concluded that but for Changes 23 and 48 each USL vessel could have been delivered 15 days prior to the scheduled contract delivery date. He was persuaded by three factors in reaching this conclusion.

First, a November 1962 building schedule, initiated by the President of Sun, projected delivery of the first USL vessel in July 1964, about 60 days prior to the scheduled contract delivery date of September 29, 1964. The Board's Representative found that this intention to delivery early, expressed one month after contract signing, was supported by the fact that Sun had to delivery early in order to maximize its opportunity to earn a profit because of its low contract price.[24] Also, the award to Sun on June 14, 1963, of the follow-on Grace Line contract for construction of four vessels at $52,600,000 provided Sun with an additional motive to expedite delivery of the USL vessels. The Board's Representative, however, recog-

24. The assumption or finding that Sun's contract price was low for these five USL vessels is apparently based on the following facts. The Chief of the Office of Ship Construction reported in a memorandum to the Secretary of the Board dated July 16, 1962, that a reasonable fixed price bid for each of the USL vessels would be $12,500,000 but that due to the competitive nature of the shipbuilding industry and past bidding experience the low bid was expected to be in the range of $10,500,000 to $11,000,000. Sun became the low bidder at a bid price of $10,590,000 per vessel. It is of interest that the next lowest bid was $10,786,000 per vessel.

nized that even absent the changes the early delivery dates contained in the November 1962 building schedule could not have been met.

The second factor that persuaded the Board's Representative of 15 days of pre-contract delivery date delay per vessel was the testimony of Mr. E. Scott Dillon, to the effect that Sun could have delivered the vessels early absent the changes. Prior to the hearing, it was Mr. Dillon's opinion that the first vessel could have been delivered at least 30 days prior to the scheduled contract delivery date absent the changes. After reviewing the discovery material and superficially studying the evidence presented at the hearing prior to his testifying, Mr. Dillon modified his opinion to suggest probable delivery of the first vessel within a range of 0 to 30 days prior to the contract date and if a precise date had to be selected, then 15 days prior to the scheduled contract delivery date. Mr. Dillon's conclusion was primarily based on his assessment that the disruptive effect of the changes could normally be expected to cause a total delay of at least 75 days for the five vessels.

The final factor that persuaded the Board's Representative was his own analysis of some of the "other events" which delayed the construction of these vessels: (1) the addendum to the Contract signed on February 25, 1963, providing for a single plane turbine engine; (2) tardiness in the preparation of engineering and working plans for an Atlantic Refining tanker, Hull 627, which delayed the engineering effort of the USL vessels; (3) 16 days of rain in April 1964; (4) inoperation of one crane in October 1963; and (5) repair work on the CUYAHOGA during June, July, and August 1964, which diverted workers from the USL vessels.

The Board's Representative concluded that these incidents substantially reduced the prospect of Sun's ful-

filling its intention of delivering the vessels 60 days early. He decided that it was "not possible, or indeed proper, to conduct an independent investigation of the facts." Therefore, he accepted Mr. Dillon's conclusion that but for the changes each vessel could have been delivered 15 days prior to the contract delivery date as the "most objective, carefully considered and impregnable evidence of record."

All parties take exception to this recommendation. Sun argues that the evidence supports a finding that the changes caused an average per vessel of 75 days of pre-contract delivery date delay. Sun's position is based on 1) Sun's history of delivering MarAd vessels early; 2) the necessity to Sun of early delivery in order to make its bid competitive and the Contract profitable; 3) the November 1962 building schedule setting delivery for each vessel 75 days in advance of the scheduled contract delivery dates; 4) the motivation of the Grace Line contract to delivery the USL vessels early; 5) testimony of Sun's witnesses that Sun intended and had the capacity to accomplish the intention of delivering the USL vessels according to the November 1962 delivery schedule; 6) the changes added four months of work to the Contract. USL and Staff Counsel contend that the preponderance of evidence shows that Sun could not have delivered the USL vessels prior to the scheduled contract delivery dates even if the changes had not been made. Their position is based on some of the evidence relied on by the Board's Representative in his recommendation and on additional alleged delay factors.

We are not persuaded by either the recommendation of the Board's Representative or by Sun's position.

First, we find that Sun's intention during the early stages of the Contract to attempt to deliver the USL vessels early, as evidenced by the November 1962 building

schedule, to be of little, if any, probative value with respect to Sun's actual ability to deliver early absent the changes. We view this highly optimistic and ambitious schedule as an attempt by the contractor to set forth challenges for its staff to meet in the performance of the Contract and to provide a time cushion to protect against contingencies which might, and in fact did, arise during construction.[25] We do not believe that the dates contained in that schedule, were realistic predictions of future performance but rather were designed to provide an incentive for increased production by shipyard personnel.[26]

Second, we disagree with the unwarranted reliance by the Board's Representative on the 15 days of pre-contract delivery delay testimony of Mr. Dillon to the exclusion of the testimony of other witnesses.[27] Messrs. Hoffman, McGowan, and Lowry, all of whom were at least and probably more familiar with the relevant facts, testified that even absent the changes Sun would not have delivered the vessels in advance of the scheduled contract delivery dates. Two USL witnesses, Mr. Young and Mr. Snow, both supported the testimony of MarAd's witnesses that the vessels could not have been delivered early. Further-

25. Mr. Dillon stated with respect to this schedule that it "represents an optimistic schedule, one which sets forth challenges to the shop foreman and all supervisory personnel." (Tr. A-1492.)

26. Mr. Grant, a MarAd witness, testified that Mr. Hutchinson, Superintendent of Production Control for Sun, expressly told him that Sun used its schedule for this purpose. (Tr. A-1389.)

27. For example, the Board's Representative states that Mr. Lowry's testimony "failed to address itself to the possibility of any pre-contract delivery date delay." (Recommended Decision, p. 90) Yet, in reviewing the record we find Mr. Lowry testified:

> "It was my conclusion that based on the degree of progress that existed immediately prior to the authorization of the change 23 and Sun's performance on other work for the Maritime Administration and the status of material deliveries that it was unlikely that they would have delivered these vessels in advance of the contract delivery date." (Tr. A-1235.)

more, Mr. Dillon in his testimony conceded that the vessels could have been delivered zero days early even absent the changes. It should also be noted that Dr. Dillon qualified his testimony because he had not made a detailed study of the production analysis reports obtained during discovery and because he was not familiar with all of the prior testimony at the hearing. Under these circumstances we think the Board's Representative erred in attaching so much significance to the figure—15 days prior to the scheduled contract delivery date—chosen by Mr. Dillon when he was urged to pick a precise date for delivery.

Third, although the Board's Representative listed *some* of the "other events" which delayed performance of this Contract he did not take into account other events which also delayed the performance of the Contract. A complete review of the record with respect to the facts concerning the delay caused by other than the changes discloses that there was delay in the engineering for these vessels both prior to and after the change orders were issued. These engineering problems were not entirely related to the changes. Sun's material procurement was "so late as to jeopardize completion on the [scheduled] contract delivery date." (Tr. A-1743). The Board's Representative concluded that the late material procurement did not affect delivery because Sun was aware of the probability of the changes and had no need to press suppliers of materials. Sun's witnesses at the hearing, however, testified that Sun did not delay material procurement because it knew of the probability of changes. Thus, we think the late material procurement is a factor to be considered in determining whether Sun would have delivered early but for the changes. Our review of the record also indicates that Sun's production effort on the Contract was adversely affected by the diversion of manpower for repair

work. All of these factors together with the incidents considered by the Board's Representative support the conclusion of Messrs. Hoffmann; McGowan and Lowry that even absent the changes Sun could not have delivered the USL vessels prior to the scheduled contract delivery dates. In any event, it is our conclusion, on the basis of the record, that Sun has not sustained its burden of proving that it not only intended to deliver early but that absent the changes it would in fact have delivered the vessels prior to the scheduled contract delivery dates. Any deficiencies or ambiguities in the record in this regard must be resolved against Sun, the party bearing the burden of proof, and consequently Sun must bear the onus of failing to meet that burden proof.

(2) *Post Contract Delivery Date Delay*

The Board's Representative recommended that Sun was entitled to recover delay costs for the full 232 days of actual post contract delivery date delay. Deliveries of the vessels occurred as follows:

Hull	*Contract Delivery Date*	*Actual Delivery Date*	*Days Late*
629	9-29-64	11-12-64	44
628	12-13-64	1-15-65	33
630	2-26-65	4-14-65	47
631	5-12-65	6-29-65	48
632	7-26-65	9-24-65	60

The Board's Representative based his conclusion on the finding that the changes involved 75 days additional work, which was more than the amount of actual post contract delivery date delay on any of the vessels, and on the further finding that $80,800 of overtime was necessary to expedite delivery of the first two vessels. He also in-

dicated that while deliveries of the last three vessels might have been accelerated by incurring additional costs Sun was under no contractual obligation to do so.

Staff Counsel and USL contend that the Contracting Officer was correct in allowing recovery for 209 days or a maximum of 44 days per vessel, leaving 3, 4 and 15 days of unexcused delay for the last three vessels respectively. Staff Counsel argues that it is well established that there is a "learning curve" in the production of successive vessels and therefore, the last vessels should have been delivered sooner. He also contends that Sun's decision to devote manpower to the CUYAHOGA repair project diverted labor from the USL vessels and that Sun's decision to delay the start of construction of the last two vessels delayed their delivery. Such conduct, it is argued, demonstrated a lack of due diligence in the construction of the last two vessels.

We reject these contentions and adopt the finding of the Board's Representative that Sun is entitled to recover delay costs for the entire post contract delivery date delay period. We note that construction of the first two vessels entailed a total of 16¾ and 20 months from keel laying to delivery respectively; the third vessel 21¼ months; the fourth vessel 16½ months; and the fifth vessel only 15¾ months. Thus, the shorter construction time for the last two vessels clearly reflects the effect of the learning curve. The reason why these vessels were delivered later than the first vessel was a decision by Sun to delay keel laying for the last two vessels. This decision was made for two reasons: 1) the difficulties experienced in installing the changes-related equipment through the double bottoms encountered in the first three vessels induced management to delay the keel laying of the last two vessels to prevent this problem from arising; and 2) a desire by Sun to lessen the additional amount of services required by the last two

vessels and thereby lessen the expenses caused by the changes. Thus, the delay in the keel laying of the last two vessels was designed to reduce changes-caused expenses and was not due to lack of due diligence on the part of Sun.

While we agree with Staff Counsel that the diversion of manpower to the repair work on the CUYAHOGA significantly impaired Sun's ability to perform on the USL Contract, we have already taken this factor fully into account in denying Sun's claim for pre-contract delivery date delay costs. Therefore, we do not believe that Sun's recovery for post contract delivery date delay should be reduced because of the diversion of manpower due to the repair work.

Accordingly, we agree with the Board's Representative that Sun's recovery of delay costs should be based on the full 232 day period of post contract delivery date delay.

B. *Costs of Delay.*

(1) *Labor Escalation.*

This issue concerns the increased labor cost to Sun of performing unchanged work in a later time period due to the changes-caused delay. There is no dispute that under Sun's collective bargaining agreements labor costs escalated during the period of the Contract and that Sun did perform a number of labor hours on the "unchanged" work in higher wage periods as a result of the changes-caused delay. The dispute centers on the time in construction when changes-caused labor escalation occurred, the exact number of labor hours expended in higher wage periods due to the changes-caused delay, and the appropriate total contract labor input to be used in the labor escalation formula.

The Board's Representative found that delays were caused to both non-outfitting and outfitting production. Therefore, he concluded that Sun should recover $72,185 for labor escalation computed by using both outfitting and non-outfitting labor hours and the 15 days precontract delivery date delay plus the actual post contract delivery date delay for each vessel.

Staff Counsel takes exception to this recommendation of the Board's Representative contending that the changes-caused delay occurred during and not prior to performance of outfitting work and that the delay to pre-outfitting work was due to causes under Sun's control and not to the changes. Hence, Staff Counsel argues that it was error to accept Sun's formula which applied Sun's wage increase trends to a *total* contract labor input of $28,600,000. Further, Staff Counsel argues that even assuming the changes threw performance of pre-outfitting labor into a later time period, the recommended award of the Board's Representative should be reduced by $18,000 to reflect Sun's optional undertaking of repair work on the CUYAHOGA which resulted in a diversion of manpower from USL ships of 200,000 manhours and also by an additional $18,000 to reflect the actual total contract labor input of $22,133,000 rather than Sun's estimated $28,600,000. USL relies on Staff Counsel's exceptions.

We agree with the Board's Representative that both pre-outfitting and outfitting work were affected by the changes. Change 23 was approved on May 31, 1963, before outfitting took place on the first vessel. It is not clear exactly when outfitting first occurred, but Staff Counsel has maintained it was not until the time of launch which was on May 13, 1964, for the first vessel. Certainly by that time outfitting was significantly occurring. The exact scope of Change 23 was not settled until long after

May 1963 and the engineering for both changes was not settled until May of 1964. Even assuming the changes only directly affected outfitting work it is apparent that once Sun became aware that the changes would cause some delay in delivery of the vessels it had to readjust its already scheduled construction sequence affecting pre-outfitting work in order to deliver the vessels as timely as possible and in order to reduce the overall cost of both the changed work and basic contract work. Otherwise, the unchanged work would have proceeded at the originally scheduled pace and the changed work at the delayed pace, most likely producing even greater disruption and delay in delivery of the vessels than actually occurred.

We consider that Staff Counsel's contention that the recommended award should be reduced because of the failure to consider the effect of Sun's optional undertaking of repair work on the CUYAHOGA is relevant to the number of days of changes-caused delay subject to labor escalation. In denying Sun's factual claim for pre-contract delivery date delay, we fully took into account the diversion of men to perform repair work on the CUYAHOGA. Therefore, this factor is taken into account in our determination of 232 days of changes-caused delays. The Board's Representative based his award for labor escalation on utilization of a delay period of 307 days—75 days of precontract delivery date delay and 232 days of actual post contract delivery date delay. Since we have decided that there was no precontract delivery date delay, the award for labor escalation must be reduced by 75/307 or 24.4 percent.

We agree with Staff Counsel's contention that Sun's formula improperly utilized a figure for total contract labor input of $28,600,000. That figure improperly included allocation of all overhead expenses, including cost

of rent, depreciation, electricity, insurance, etc. An actual audit demonstrated that the total direct labor input to the Contract was only $17,163,000. Indirect labor was established at the hearing as being equal to 29% of direct labor or approximately $4,970,000. Thus the total labor input which would be subject to escalation was only $22,133,000. On this basis, the Board's Representative overstated the amount of labor subject to escalation by approximately $6,500,000. As calculated by Staff Counsel under the formula for labor escalation this overstatement requires a reduction of $18,000 in the recommended award of the Board's Representative.

Accordingly, the award of $72,185 for labor escalation must be reduced by 24.4 percent because of our denial of the claim for precontract delivery date and by $18,000 for the use of the improper amount of labor input. Therefore, we award the sum of $38,111.86 for labor escalation.

(2) *Material Escalation*

The Board's Representative recommended award of $82,125 for material escalation. He based this award on the $22.5 million value of material which Sun claimed it purchased late because of the changes. Although the total amount of materials purchased under the Contract was valued at $27.5 million, Sun claimed that material committed by suppliers prior to the changes was valued at only $5 million. The Board's Representative accepted Sun's method of computation based on the application of the increase in the wholesale price of metals and products index to the $22.5 million dollar figure for the period of the delay.

Staff Counsel, supported by USL, raises several objections to this finding of material escalation. Staff Counsel notes that Sun submitted no evidence of material es-

calation except for its citation of the wholesale price index. No attempt was made by Sun to prove that material procurement was thrown into a later time period because of the changes and that increases in the prices of the material required for the vessels did in fact occur. Sun did not introduce a single invoice or purchase order showing that the price of any item increased during the period of delay caused by the changes. Indeed, Sun's President, Mr. Atkinson, testified that Sun did not delay the purchase of material when it learned that the changes would be directed. (Tr. A-2353.) Moreover, Mr. McGowan, Chief of the Division of Estimates at MarAd, testified that the cost of much of the steel was not subject to escalation because it was purchased at the same time it would have been purchased absent the changes and the cost of the main boilers and engines were not subject to escalation because the costs of these items were committed before the changes were authorized. (Tr. 639, 640).

Finally, Staff Counsel argues that as for material directly related to the changes, the increased cost of such material has been included in the award for hardware. The $950,000 which was agreed to by the parties as the added material cost for the five vessels required by the changes actually covers material purchase orders and subcontracts having a total value of approximately $10 million. Therefore, Staff Counsel contends no escalation should be awarded for this material.

We agree with Staff Counsel and USL that Sun's failure to introduce material procurement records to prove what material escalation, if any, in fact occurred constitutes a failure to sustain the burden of proof. Indeed, under these circumstances where direct proof of material procurement records was available, reliance on the wholesale price index represents a classic example of the failure

of a litigant to satisfy the requirement of the burden of proof. We cannot accept Sun's uncorroborated assertion that material escalation occurred and that the wholesale price index is the correct measure of that escalation in view of Sun's failure to introduce any affirmative evidence and the contrary testimony by Mr. McGowan. Accordingly, we deny Sun's claim for material escalation for its failure to sustain its burden of proof.

(3) *Services.*

The Board's Representative awarded $172,349[28] for additional services performed during the changes-caused delay period including such items as crane service, cleaning and caretaking, temporary lights, and water and air services. The Board's Representative based this award on the following computation: the number of days delay (7⅔ months) x 3500 hours per month x $5.78 per hour labor cost. His computation of the number of delay days for this item was based on his finding of 15 days pre-contract delivery date delay plus the actual post contract delivery date delay for the first three vessels and the agreement of the parties that construction time for the last two vessels was only extended one month because of the changes.[29]

28. Although the Board's Representative in his Recommended Decision awarded $159,210 for services, Staff Counsel in his computation of the award based on that decision pointed out that because the Board's Representative disallowed part of the claim for production labor for installing electrical cable the service amount contained in the hardware claim must be reduced by $13,139 and this amount added to the award for services during the delay period. The Board's Representative in his Recommended Order accepted this suggestion.

29. Keel laying for the last two vessels was delayed by management in order to reduce expenses, *supra* at pp. A79-A80. Thus, construction time for the last two vessels was decreased. Since services are a function of construction time, only one month of additional services was necessary for each of the last two vessels.

The 3500 hours per month was based on Sun's estimate of 3500 hours of additional services per month. It was derived from a "combination of accounting records and other information" and allegedly reflected a deduction for the service increment contained in the basic hardware claim. The Board's Representative rejected Staff Counsel's contention that only 1870 hours per month should be allowed for additional services based upon the lowest number of hours per month actually experienced for crane service, cleaning and caretaking, and temporary lights, air and water service. He stated that Staff Counsel's reliance on the *minimum* rather than the average number of hours did not seem to be fair and reasonable.

Staff Counsel argues that the Board's Representative erred in his acceptance of Sun's unsubstantiated claim that total services averaged 5000 man-hours per month. (Sun reduced this amount to 3500 hours in its claim to take into account services claimed as part of the hardware claim.) Staff Counsel urges that based on Sun's own records the service averaged did not exceed 3,720 man-hours. Staff Counsel also asserts that both Sun and the Board's Representative did not deduct enough hours from the service average to take into account all the services which are not time oriented and, therefore, are not affected by the delay. Such services include crane service to fabricate and erect steel hulls which depends on the quantity of steel and not time, the installation and removal at the completion of construction of temporary lighting, piping and ventilation, and the cleaning of ship tanks, cargo holds and accommodation space, prior to delivery of the ships. Staff Counsel concludes that when appropriate deductions are made to reflect the exclusion of these services, Staff arrived at the figure of 1870 hours per month per vessel.

Since Staff Counsel contended that the additional construction period during which additional services were rendered was six months, Staff Counsel arrived at the following calculations for additional services:

6 months x 1870 hours x $5.68 per hour = $63,729.60. From that figure Staff Counsel deducted $30,625 for the dollar amount of the services contained in the hardware award. Therefore, Staff Counsel concludes that Sun is entitled to only $33,104.60 for additional services due to the delay. USL relies on Staff Counsel's argument in its exception.

We agree with Staff Counsel that Sun and the Board's Representative have inflated the amount of hours of additional services per month provided during the period of delay by Sun because they rely on a base of an average of 5000 service hours per month whereas actual audit returns reveals a figure closer to an average of 3700 such hours. On the other hand, we agree with the Board's Representative that Staff Counsel's use of the figure 1870 hours per month is unrealistic because, as Staff Counsel argued before the Board's Representative, it is based on the minimum amount of hours of additional service. Accordingly, and in the exercise of our best judgement, we have decided to increase Staff Counsel's figure by one-third to 2500 hours per month which we believe to be a fair and reasonable evaluation of the amount of hours per month of additional services rendered by Sun.

Based on our prior determination that there was no pre-contract delivery date delay, we find that for purposes of additional services the delay period for the first three vessels was the actual post contract delivery date delay or a total of 124 days. We accept the agreement of the parties that construction of the last two vessels was extended by only 30 days each because of the delay. Thus,

the delay period during which additional services was provided was 184 days or 6 and ⅛ months.

Therefore, the following computation is used to derive our award for additional services:

6⅛ months × 2500 hours = 15,313 hours
15,313 hours × $5.676 per hour = $86,916.59

From which amount there must be deducted $44,589.52 awarded for services in the hardware award. Accordingly, we award $42,327.07 for additional services.

(4) *Financing.*

The Board's Representative denied Sun's claim of $51,875 as its cost of financing due to the delay caused by the changes. The claim was based on the Government's delay in payment of the contractual five per cent holdback until delivery which was delayed by the changes. The Board's Representative based his denial of the claim on the ground that the cost of financing is included in unabsorbed overhead. No party takes exception to this decision.

Staff Counsel, however, points out that the *hardware* claim contained $101,500 for cost of financing due to the delay in payment of the hardware costs by USL and MarAd and that this amount should be deducted from the award for hardware based on the same rationale used by the Board's Representative for denying financing costs in performing unchanged work.

We agree with Staff Counsel that this amount should be deducted from the hardware claim. Our reason is that Sun's present claim for these costs is actually an attempt to recover interest under another name. In a document entitled "Time/Magnitude Relationship of Sun Ship's Cost" which was filed by Sun after oral argument before the Board's Representative at his request Sun states that these financing costs

> "were estimates to assess the financial impact of not being paid for the changes within a reasonable period of time. *These amounts have now been removed from the direct claim since they no longer reflect the elapsed time.*" (Emphasis added.)

Sun substituted for the removed costs a claim of $1,515,000 for these "costs from 1965 through 1970." Sun's unabsorbed overhead claim does not cover that time period; however, we view the claim of $1,515,000 (subsequently substantially increased) as an attempt to recover interest which we discuss in Part V.

Since Sun has conceded that the sum of $101,500 for cost of financing is no longer part of its direct claim, we find and conclude that that sum must be deducted from the hardware claim.

(5) *Unabsorbed Overhead.*

Because Changes 23 and 48 delayed delivery of USL vessels beyond scheduled contract delivery dates, Sun incurred "continuing or fixed" overhead costs during the changes-caused delay period for which it was not compensated by the fixed price Contract. Continuing or fixed overhead costs are, according to Sun's accountants, the essentially time-oriented costs of having a facility available to do business at a determined level. They include property taxes, depreciation, the management, and certain outside services. Sun claims that it is entitled to recover, as a cost of performing the changes, those continuing overhead costs (hereinafter referred to as "unabsorbed overhead") incurred during the delay period for which it will not receive compensation from the continuing cost portion of the overhead rate applied to the changed work in the hardware section. To compute the unabsorbed overhead

Sun has advanced a daily rate method formula that is a function of time. It argues that its normal method of allocating overhead costs to direct labor costs does not cover a delay period when there is either no direct labor or reduced direct labor being applied. The daily rate formula is as follows:

> 1. Continuing overhead attributable to non-hull production is subtracted from the total continuing overhead for the entire yard producing continuing overhead attributable to new hull production.
>
> 2. The latter is divided by the number of new hulls normally produced per year × 365 days producing continuing overhead (new hull)/vessel days.
>
> 3. This figure is multiplied by the vessel days delay due to changes to produce the continuing overhead due to changes-caused delay.
>
> 4. The continuing overhead absorbed by Sun's hardware claim is subtracted from this result to produce the continuing overhead recoverable as a cost under the contract changes clause.

With respect to Sun's claim for unabsorbed overhead the Board's Representative recommended:

> "Approximately $356,000 [corrected to $529,000 in Recommended Order] recommended for unabsorbed overhead based upon 307 days of changes-caused delay by application of daily overhead rate formula endorsed in decisions of Court of Claims and Armed Services Board of Contract Appeals . . . ."

This recommendation was based on a determination that Article 4 of the General Provisions of the Contract is authority for recovering such cost. Sun takes no exception to this recommendation except as it incorporates a finding of 307 days of changes-caused delay rather than 607 days. USL and Staff Counsel take numerous exceptions to this recommendation. They deny that Sun incurred any unabsorbed overhead on this Contract. USL adds that if there were unabsorbed overhead, Sun had to prove and failed to prove it sustained a loss of business. Staff Counsel adds that if there were unabsorbed overhead, the daily rate formula is limited in its application to exclusively reserved facilities of Sun. USL apparently argues further that if the daily rate method is utilized as Sun proposed the element therein of "number of new hulls normally produced per year" should be Sun's normal capacity rate of six hulls per year rather than Sun's actual production rate of five hulls per year.

The contention that Sun incurred no unabsorbed overhead on this Contract is based upon testimony and evidence sponsored by Mr. Max Stavis, Chief of Audits Branch, Eastern Region Office of MarAd, that Sun's annual composite overhead rate declined during the contract performance period both because of an increase in the application of direct labor in such facilities as rocket fabrication and because of a decrease in overhead or indirect labor costs as compared with the preceding period of time. Staff Counsel cites as support of this argument a commentator on accounting and defense contracts.[30] That commentator in speaking of *Lite Mfg. Co.*, ASBCA No. 4755, noted the argument advanced by Staff Counsel and commented:

> "This opinion [on reconsideration] supported the Board's view in its original decision wherein the point was made that the question involved is not whether

30. Trueger, Accounting Guide for Defense Contracts 304 (5th ed. 1966).

overhead rates had or had not increased as a result of delays. Rather, the point at issue is whether the time of performance of the contract had been prolonged. *Where it can be proven that the time of performance is prolonged through the Government's action, and where the overhead expenses do continue, the Board found that, of necessity. . . . more of such expenses were incurred during the period of performance than would have been except for the suspension.*"[31] (Emphasis added.)

This dispute involves a delay of work rather than a suspension of work, but the point is the same. The argument that the annual composite overhead rate declined is essentially irrelevant to ascertaining the occurrence of unabsorbed overhead in this instance where the changes directed by USL and MarAd delayed performance of the Contract beyond the scheduled contract delivery dates into a period when continuing overhead costs were incurred. In other words, without the delay of the changes the annual composite overhead rate would have declined further.

USL argues that Sun must prove it sustained a loss of business, which USL asserts has not been proven, in order for Sun to recover unabsorbed overhead. This position was advanced by representatives of Price Waterhouse & Co. who testified as USL's witnesses on this matter. The premise of this position is that there is no inherent right to recover overhead costs from an accounting viewpoint because absent other business a contractor ordinarily incurs continuing overhead costs at the end of the delayed contract or at the end of other contracts it presently has. If no additional contracts or business were acquired, the time

31. *Id.* at 404-05.

period for incurring those continuing costs normally so absorbed by the contractor would be shifted in the case of a changes-caused delay to the delay period of this Contract. Sun does not identify any specific business it lost during this time period but instead retorts that USL's position is absurd in that 1) the delay in this instance occurred not during a complete stoppage of work but during a time period that can not be precisely ascertained, 2) the exact length of the delay period is determined long after the Contract is performed, and 3) due to the long lead time involved and the sheer size of the work force and the shipyard facility it is not possible to instantly accommodate a delay. At the hearing Sun also argued that new vessel construction work succeeded the USL Contract but that it would be contrary to common sense and sound accounting practice to allocate the overhead in question to those contracts when caused by changes under the USL Contract.

We agree with the recommended position of the Board's Representative on this point. He recommended such costs were an increased cost caused by changes compensable under Article 4 of the General Provisions of the Contract as part of the 110% cost recovery under that clause. Therefore, the premise of the loss of business argument—that there is no inherent right to recover those unabsorbed overhead costs—is inopposite in this instance where the costs arise from changes-caused delay. Even absent Article 4 a contrary decision would be completely at odds with the situation presented. In this instance, Sun was proceeding on several contracts at the time of the changes and the exact delay period will not be determined finally until this final decision. To require Sun under those circumstances to comply with the loss of business argument would subject Sun to contracting for additional work during the "delay" period, which USL and MarAd would

probably legitimately argue unavoidably delayed performance on the USL Contract.

The other principal argument raised against the application of the daily rate formula in this instance is Staff Counsel's argument that the formula should be limited in application to on-site construction work or in this instance to these facilities exclusively reserved in Sun's shipyard for the USL vessels during the changes-caused delay period.[32] Since Staff Counsel contends the changes-caused delay occurred post-launch this position limits the delay rate formula to use of the wet basins. The point of this argument is that a delay to an exclusively reserved facility entails the idling of that productive facility, which is then set aside and not devoted to other work. Delay to a jointly used facility, however, while reducing progress on the USL project would not preclude other projects in that facility from more productively using the facility, the net result being no idling of the overall jointly used facility. Staff Counsel adds that for a jointly used facility, it is not logical to compute unabsorbed overhead attributable to changes-caused delay because the overhead expenses attributable thereto are accounted for in an indivisible overhead pool from which overhead expenses are allocated on a pro rata basis to the direct labor dollar level for all the various contracts for a given accounting period. Sun replies that it is factually ludricrous to contend, in effect, that Sun did not reserve a substantial part of its facilities for performance of this five vessel, 34 month, $52 million Contract.

32. Staff Counsel's exclusively reserved facilities argument is discussed separate from USL's loss of business argument solely for purposes of convenience. It is recognized they are not mutually exclusive. The preceding discussion on the loss of business argument was not intended to cover any requirement to demonstrate reserved facilities in connection with a claim for unabsorbed overhead.

Staff Counsel's fundamental position, that Sun must demonstrate that its facilities or a portion thereof were reserved for performance of the USL Contract during the change-caused delay, is a prerequisite to recovery of unabsorbed overhead under the cases he cites.[33] We consider that Sun has met that burden. During construction in Sun's shipyard from 1963 through 1965 new vessel construction contracts, such as that for the USL vessels, were usually significant projects requiring construction of specially designed vessels. To accomplish that construction, the overall vessel construction program at the yard for any given time period required a complex schedule of sequential, orderly construction. Hence, a changes-caused delay initiated seven and half months after contract signing for construction of five USL vessels required a significant portion of the work force and jointly used facilities of the shipyard to be tied up and not transferable to work for other contracts.[34] Since we are not persuaded by the exceptions of USL and Staff Counsel to employment of the daily rate method formula for calculating Sun's claimed unabsorbed overhead costs, we proceed to consideration of that formula.

33. *E.g., Walter Motor Truck Co.*, ASBCA No. 8054, 66-1 BCA par. 5365; *Fletcher Aviation Corp.*, ASBCA Nos. 7669 and 8542, 65-1 BCA par. 4651.

34. None of the cases cited by Staff Counsel require that a jointly-used facility which is in part tied up because of changes-caused delay be not considered for purposes of a claim for unabsorbed overhead. To the extent the question has been considered by administrative bodies, the indication is that such facilities may be considered. *E.g., Wright Co., Inc.*, ASBCA No. 7211, 1962 BCA par. 3432 ("Whether the proportion set aside is physically segregated or merely a portion of capacity is immaterial.") The principal cases relied on by Staff Counsel, *Fletcher, supra* and *Todd Shipyards Corp.*, ASBCA Nos. 1233 and 1234 (1953), concerned delay in commencement of work. They required contractors to demonstrate that they had reserve any of their facilities during the delay period, a requirement with which we consider Sun has complied.

The daily rate method formula was recommended or accepted by Lybrand, Ross Bros. & Montgomery, Arthur Anderson and Price Waterhouse & Co., as fairly calculating the unabsorbed overhead costs caused by the changes-induced delay and has been endorsed by the Armed Services Board of Contract Appeals in equitable adjustment proceedings.[35] Only one exception has been taken to the interpretation and application by the Board's Representative of that formula, and that is USL's assertion that Sun's normal capacity rate of six hulls per year should be employed rather than Sun's actual production (delivery) rate of five hulls per year.

Aside from semantic differences between a "capacity" rate and a "production" rate this controversy over "the number of new hulls produced per year" concerns whether the measurement is the normal ability of the yard to produce hulls (capacity rate) or whether historically it is the hulls the yard has normally produced (production rate). While the production rate is perhaps closer to the literal language of the proferred daily rate formula, we do not consider it fair and reasonable that USL and MarAd should be subjected to the vicissitudes of Sun's past experiences. A fairer and more reasonable measure is the use of a normal capacity rate which may or may not be greater or less than the historically based production rate.

USL asserts that a six hull capacity rate was normal for Sun's yard during the period 1963-1965. This position is based on observations at Sun's yard, a determination that Sun could physically accommodate nine hulls in its yard, and a consideration of Sun's previous experience. USL points out that in 1965 Sun's yard actually exceeded a six hull capacity. None of the other parties directly addressed this issue, but we note that the conclusion of the Board's Representative on which hulls were to be included

35. *Eichleay Corp.* ASBCA No. 5183, 60-2 BCA par. 2688.

for purposes of this issue was the same as that urged by USL and used in its six hull capacity rate. Sun did not take exception to that conclusion of the Board's Representative. We therefore will use 6 hulls as representing "the number of new hulls produced per year" element of the daily rate method formula.

Finally, consistent with our discussion of and decision with respect to labor escalation *supra* and production disruption and congestion *infra*, the number of delay days assumed in the formula must be changed to reflect some delay in 1963. We think a fair allocation of the delay days would be in proportion to the total proportion of construction days in 1963 through 1965 for the five USL vessels commencing with the Board's approval of Change 23 on May 31, 1963. We calculate in round numbers 580 total construction days for 1963, 1580 for 1964, and 570 for 1965 or 21.24%, 57.88% and 20.88% respectively, for 1963 through 1965.

On this basis, under the formula contained in Sun Exhibit 74 discussing computation of unabsorbed overhead for USL vessels and substituting the delay period caused by the changes determined herein, the hull days per year utilized in USL Exhibit 33, and the allocated delay for 1963 through 1965, Sun is entitled to recover approximately $ for unabsorbed overhead.

IV. Delay Associated Costs—Disruption, Congestion, "Hire-Fire," and Overtime.

As previously noted, Sun in its detailed estimate claimed that it incurred the above-described costs in performance of unchanged work due to Changes 23 and 48. The parties are in agreement that Sun is entitled to $80,800 (exclusive of profit) for the asserted overtime or acceleration costs. USL and Staff Counsel would allow no recovery whatsoever for the remaining disputed dis-

ruption, congestion and "hire-fire" costs totalling $451,072 under the Recommended Order, except that Staff Counsel agrees to $59,830 for engineering disruption.

A. *Engineering Disruption.*

The Board's Representative recommended that Sun's total engineering disruption claim of 9000 hours or $59,850 be awarded. This recommendation was perhaps influenced by the conclusion of the Board's Representative that the Contracting Officer's final decision intended to allow this item. In any event, the recommendation was also based on a review of the evidence:

> "A review of the evidence convinces that Sun did in fact suffer considerable engineering disruption, not only as a result of the novel automation change which represented a substantial advance in the state of the art, but also through the successive changes in the quarters arrangement, including the unsuccessful proposed elimination of the hospital, the redesign of the galley and the re-addition of quarters for two crewmen originally thought to have been eliminated by Union agreement. The stop-revise-go experience on these changes had a disruptive effect upon the total productive effort." (Recommended Decision, p. 40.)

USL takes exception arguing, "There is absolutely no evidence that engineering disruption occurred involving *unchanged* plans." It contends that, the Contracting Officer's intention to include engineering disruption is irrelevant and that the plans affected by the so called "novel automation change" and the plans affected by the successive changes in the quarters rearrangement and related areas were all included in its experts' estimates of engineering in the basic hardware claim.

Since the recommendation of the Board's Representative includes his independent review of the record, the

recommendation will be considered only on that basis and will not be limited to interpreting the possible intentions of the Contracting Officer's final decision. Our own review of the evidence confirms the report of the Board's Representative that "the changes had a disruptive effect upon the total productive effort." These changes commenced on May 31, 1963, seven and a half months after contract signing and the details of engineering were not settled until a year later in May 1964 after a tortuous stop-revise-go routine. We have determined hereinabove that approximately 50,000 hours of engineering were added by the changes or 20 to 25% of the entire engineering effort expended after Change 23 was authorized. Since Sun's engineering staff was not unlimited, this magnitude of the engineering effort generated by the changes perforce required that the unchanged plan work was performed out of sequence to accommodate, as best as possible, the changes engineering effort. This was confirmed independently by the testimony of the Staff who compared the engineering labor of this Contract to other similar projects and concluded that Sun incurred the engineering disruption it claimed. USL presented no evidence that really brought into question Sun's claim for engineering disruption. We are satisfied, therefore, that Sun, with the assistance of the Staff, has carried its burden of proof that it is entitled to recover its claimed 9000 hours of engineering disruption caused to unchanged work by Changes 23 and 48. Based on its engineering labor rate and the 72% overhead rate determined herein Sun is entitled to recover $58,824.

B. *Production Disruption and Congestion.*

We consider production disruption and congestion costs together. We are aware that Sun claimed them

separately and that the Board's Representative considered them separately. We are also aware that conceptually these costs can be separated. Production disruption is the impact of Changes 23 and 48 to unchanged work in failing to be able to proceed in a normal, orderly sequence of work. Congestion is the cost impact of Change 23 to unchanged work resulting from working in a space either restricted by housing too many people at the same time or by being reduced in area due to additional equipment. Even conceptually, however, these costs overlap because the out of sequence work may also be performance of work in a restricted space. In actual practice, these costs apparently do overlap or become impossible to distinguish. For example, Sun's witnesses in testifying often grouped these costs together or used them interchangeably. Also, Sun's post hearing brief treated these costs together apparently because the areas in which these costs were claimed to have been incurred largely overlapped. Therefore, production disruption and congestion costs have been combined in our consideration.

The recommendations of the Board's Representative in regard to these costs are as follows:

> "Production disruption costs in the amount of $100,000 allowed for first vessel launched 75 days late due to changes. However, no such allowance authorized for succeeding vessels launched after engineering problems resolved . . . ."
>
> ". . . Sun's claim of $84,677 for changes-caused congestion in unchanged work found insufficiently documented. $25,000 allowed for first vessel only . . . ."

These recommendations were based on the conclusion that some degree of production disruption and congestion occurred as a result of the novelty of automation and that

the magnitude of the changes authorized 7½ months after contract signing was not finally settled in detail until May 1964. These recommendations also must have relied, to some degree, on the contentions of Sun with respect to the existence of production disruption and congestion in the unchanged work. These contentions were summarized by the Board's Representative as follows:

> ". . . Sun contends that the general unavailability of working plans prevented production labor from proceeding in a proper and orderly sequence and left many workers literally standing around waiting for necessary instructions. In the case of automation, the new plans were very late and their novelty rendered it more difficult and time-consuming to convey proper instructions to yard supervisory personnel; material ordering and expediting functions were delayed; conventional material specifications were rendered obsolete; vendor confusion was considerable; and material procurement, storage and movement adversely affected.
>
> Installment of the foundation for the redesigned . . . console in the first full was difficult because its delivery, three to four months late, required Sun workmen to maneuver the foundation through an opening in the forward hold. Similarly, installation of steam supply lines and steam condensate returns for heating coils in the fuel and cargo tanks had to be run through the double bottoms instead of above deck. This placed additional piping in the double bottoms impeding workmen entering to perform unchanged work. Secondly, there developed a need to relocate original piping unrelated to the change in the presence, or out of the way, of the steam lines.

Sun maintains that the lay-offs required by the production disruption also had a drastic morale effect on the remaining workers reducing productivity." (Recommended Decision, pp. 60-61.)

With respect to Sun's method of computation for these costs,[36] the Board's Representative rejected it as too theoretical, too unrelated to the relevant facts, and "unsupported in fact or reason." Particular exception was taken to Sun's presentation of congestion. In lieu of Sun's method of computation, it was reasoned that production disruption and congestion were limited to the first vessel because the first vessel was delayed 75 days in launching till May 13, 1964; the second vessel was launched July 7, 1964, by which time the engineering problems of the changes had been resolved (May 1964) and time remained to smooth out production problems before launch; and it was Sun's practice to schedule transfer of its production crews from vessel to vessel on a 60-75 day sequence. The claim was then considered "as would a jury" and $100,000 for production disruption and $25,000 for congestion for the first vessel was recommended to be awarded as compared to Sun's claim of $239,292 for production disruption and $38,148 for congestion for the first vessel.

Sun takes no exception to these recommendations, but USL and Staff Counsel argue that no amount should be awarded for these costs either because Sun did not experience these costs or because it failed to carry its burden of proving it incurred these costs as a result of the changes. They cite testimony presented that when the console foundation was installed 80% of production labor in the

36. Sun applied a decreasing factor percentage for each succeeding hull against affected production hours or affected electrical and mechanical hours to derive the hours claimed for each hull for production disruption and congestion which was then multiplied by the labor and overhead figure of $5.78.

engine room had been completed, that the electrical work connected with the console was not exceptionally difficult, that Sun was experiencing "serious material shortages" prior to the changes, that Sun was late in its initial development of plans, and that a USL construction representative observed no congestion in the double bottoms. They also argue that there was no proof of the novelty of the automation change, that Sun failed to produce any "obsolete" material specification or material procurement schedule, that shipbuilding practice would indicate the related unchanged work in the double bottoms would have been completed long before the steam lines were installed, that the lay offs complained of were not proven to have been caused by the changes, that Sun applied its manpower normally until 1964 as shown by a MarAd manpower curve, that with respect to congestion the extension of time of 209 days removed any basis for that claim, that Sun failed to account for its own inefficiency affecting unchanged work, and finally that the Board's Representative confused disruption and congestion to changed work with disruption and congestion to unchanged work.

We are persuaded that Sun has proven it incurred some changes-caused production disruption and possibly congestion to unchanged work, although the evidence is by no means overwhelming. The special installation problems of the console foundation on the first vessel prevented outfitting to unchanged work from proceeding in an orderly fashion around the access opening and in the engine room. The disruption to "unchanged" engineering, which Staff Counsel concedes and which we herein find, undoubtedly had an adverse disruptive effect on the "unchanged" production labor that was proceeding or trying to proceed at the same time as the engineering. Further, the installation of additional steam lines in the double bottoms obviously increased the difficulty in working on

unchanged work in that area, and we are not persuaded that no unchanged work occurred or should have occurred at the time of or after installation of such steam lines. Sun, however, has not carried its burden of proof that problems related to material procurement were the result of changes and not other causes. Apparently, the Board's Representative gave no credence to Sun's claim of disruption due to layoffs and since Sun has requested separate, additional "hire-fire" costs we will consider that issue under the "hire-fire" section hereinafter. The Staff's manpower curves do not support a finding that no changes-caused production disruption and congestion occurred to unchanged work in view of the other evidence to the contrary.[37] With respect to congestion in particular, while a time extension theoretically could remove the basis for congestion it cannot eliminate the problem of a space restricted by additional equipment. Also, as a matter of practicality, the shipbuilder must proceed not knowing the time extension, if any, to which it is entitled.

With respect to the *extent* of changes-caused production disruption and congestion to unchanged work that Sun incurred, there is a paucity of evidence either as to the extent for any given area such as in the double bottoms or as to total production under the entire Contract. We agree with the Board's Representative that Sun's

37. The Staff's manpower curves, which are an exhibit to Staff Counsel Exhibit L, consist of a comparison of the work performed under this Contract to a schedule of what the work should have been. The schedule was compiled from experience under other new vessel construction contracts with MarAd. They show that manpower was applied normally on the USL vessels until May 1964. These curves were apparently instrumental at the level of the Contracting Officer's decision. This evidence was not seriously pursued at the hearing. Without knowing the judgments involved in the scheduled curves to a greater degree than appears in the record we have no means nor would the Board's Representative have any means of evaluating this evidence.

method of computation must be rejected as too theoretical and as unproven in fact or reason. We cannot agree that any award for such production disruption and congestion must be restricted completely to the first vessel. That conclusion of the Board's Representative is predicated on an assumption that the production disruption and congestion to unchanged work related to outfitting or work performed at the time of outfitting, an assumption to which no apparent exception has been taken. However, the overlapping, staggered nature of engineering and production labor and the existence of engineering disruption affected production labor preceding outfitting on at least the first two vessels. Moreover, the steam lines in the double bottoms had to be installed in the first three vessels after the keels were laid, thereby requiring additional workmen in the double bottoms which interfered with other workmen and caused problems to other lines already installed. There is no evidence, however, other than total conjecture, of any production disruption and congestion in unchanged work occurring to the last two vessels. Therefore, we conclude that most of the changes-caused production disruption and congestion to unchanged work occurred to the first vessel, due to its special problems and due to the fact that most of the affected unchanged work was outfitting, and that a small amount of such production disruption and congestion occurred to the second vessel and a lesser amount to the third vessel. The Board's Representative recommendations of $100,000 for production disruption and $25,000 for congestion on the first vessel are based solely on the jury verdict approach. No basis is given for those particular amounts. Even assuming there is an unexpressed, reasonable basis for the recommendations, it is difficult to verify. One problem is that in relation to Sun's claim of $239,292 for production disruption and

$38,148 for congestion the Board's Representative, peculiarly, recommended a greater proportionate amount for congestion than for production disruption even though he concedes Sun's presentation for congestion is even more abstract than for production disruption. Another problem is that the discussion in the Recommended Decision does not particularly distinguish between changed and unchanged work so that we are concerned that the recommendations may have included production disruption and congestion to changed work. We are further concerned that the recommendations appear not to have taken into account at all the possible overlap of Sun's production disruption and congestion claims. A final problem is the uncertainty of which areas of alleged production disruption and congestion to unchanged work the recommendations encompass.

Under these circumstances it is difficult to state with precision the amount to which Sun is entitled to recover for these costs although we are persuaded that Sun is entitled to recover some amount. This dispute has unfortunately been a subject of controversy in this Agency for close to six years. We would consider it a frustration of justice, therefore, to remand this dispute on this issue if we can determine some approximate fair and reasonable amount to which Sun is entitled to recover. Therefore, we feel compelled to again exercise the jury verdict method previously discussed. Taking all the foregoing discussion on these costs into account and giving effect to the learning curve we find and conclude that $90,000 for the first vessel, $15,000 for the second vessel and $5,000 for the third vessel is fair and reasonable for the production disruption and congestion Sun experienced under this Contract in the unchanged work as a result of Changes 23 and 48.

C. *"Hire-Fire" Costs*

"Hire-fire" costs refer to the inefficiency and loss of general experience and related costs arising out of the lay off by Sun for more than 30 days of 669 persons in outfitting crafts in late December 1963 through February 1964 allegedly on account of Changes 23 and 48. The Board's Representative recommended:

> "Allowances of $236,222 recommended for changes-caused layoffs of 669 workmen based upon loss of efficiency computed in accordance with the method followed by Pennsylvania State Employment Service . . . ."

The conclusion that the layoffs were tied to the changes was apparently based on the opinion that but for the changes the first vessel would have been launched on February 28, 1964, about two months after the preceding vessel in the Sun yard, the ATLANTIC HERITAGE, was delivered, which was a normal span of time in which to shift the outfitting crews from vessel to vessel.

Despite the fact that in its post hearing brief Sun claimed $435,000 for the layoff of 1,138 men from September 1963 through February 1964, Sun takes no exception to this recommendation. USL and Staff Counsel take exception to the finding of a causal relationship between the changes and the layoffs. They argue that "the layoffs occurred because of the scheduled hiatus between the delivery of the ATLANTIC HERITAGE and the first USL vessel." Sun rebuts that the first USL vessel was scheduled to be launched on February 28, 1964, and that the record is clear that Sun begins outfitting before launching and would have so commenced outfitting on the first USL vessel with the laid off men but for the changes.

We are not persuaded that there has been established a causal connection between the layoffs and the changes. The hulls in Sun's yard about the time of the layoffs and the actual or scheduled delivery dates of those hulls were as follows:

Owner	*Sun Hull No.*	*Actual or Scheduled Delivery Date*	*Delivery Sequence*
AEIL	624	6-14-63	
			42 days
AEIL	625	7-26-63	
			56 days
AEIL	626	9-20-63	
			88 days
ATLANTIC HERITAGE	627	12-17-63	
			211 days
USL	628	7-15-64 (Sun's schedule)	

The delivery sequences on Hulls 624 to 627 were consistent with Sun's testimony that it endeavored to employ a construction sequence of 60 to 90 days to permit outfitting personnel to be progressively transferred from vessel to vessel at a point in construction when the vessel was at a stage when it could most efficiently accept such personnel. The delivery sequence between the ATLANTIC HERITAGE and the first scheduled USL vessel, even utilizing Sun's early delivery schedule, which the Board's Representative did not recommend, was seven months. Sun had a choice of either changing its usual construction procedures, laying off outfitting personnel for most of the interval, or finding vessel repair or other work for the

workers affected. In the shipbuilding industry this situation, unfortunately, is not unusual because vessel construction contracts, such as for the USL vessels, are major projects requiring a relatively large labor force and such contracts simply have not been available in sufficient quantity to permit continuous employment of such labor force and thereby avoid significant layoffs.

The President of Sun testified that presented with this situation Sun's choice was to shift the outfitting crews from the ATLANTIC HERITAGE to the first vessel and proceed rapidly on the USL project. It is Sun's contention that especially the quarters changes, first authorized on October 1, 1963, and significantly modified in February 1964, frustrated this plan and that USL was advised at the time of the quarters changes to this effect. There was, also, testimony that Sun was unsuccessful in finding significant vessel repair or other work for the laid off outfitting personnel.

Even assuming that USL and MarAd can be held accountable for the consequences of the failure of Sun's special plan of shifting outfitting crews prior to launch rather than significantly after launch and even assuming the reasonableness of Sun's original launching schedule, Sun still has not established a causal connection between the layoffs and the changes because it has not established that delays in the originally scheduled launch of the first USL vessel were attributable solely or even substantially to the changes.

An essential premise of Sun's position that there is a causal connection between the changes and the layoffs is that delays in the original construction schedule, especially for the stage of construction of the first scheduled USL vessel to be launched on February 28, 1964, were solely or mostly caused by the changes. We are not persuaded

that delay in that construction schedule was caused by the changes rather than by events for which Sun was responsible.

Sun in November 1962 scheduled keel laying and launch of Hulls 628 and 629. That schedule and the actual keel laying and launch dates for those hulls are as follows:

Hull	*Scheduled and Actual Keel Lay*		*Scheduled and Actual Launch*	
628	6- 1-63	5-15-63	2-28-64	7- 7-64
629	8-30-63	6-18-63	5-31-64	5-13-64

As is evident Hulls 628 and 629 were interchanged after keel lay. This occurred in August 1963 to take advantage of the larger crane facilities at No. 8 way where Hull 629 was being constructed. Sun maintains that its decision to interchange these hulls did not result in any delay in delivery of the vessels. That position aside, it is apparent that the interchange of hulls delayed the time when the first vessel, whatever its hull designation, could receive outfitting crews including the period herein concerned, October 1963 through February 1964. From the standpoint of cumulative manhours per hull Hull 629 did not surpass Hull 628 until around January 1964. From certain other standpoints, such as percentage of erection completion, Hull 629 surpassed Hull 628 somewhat sooner in November 1963.[38] It follows that it was several months thereafter from either standpoint before Hull 629 reached the vessel percentage completion that Hull 628 would

38. The actual cumulative manhours for the USL hulls are reflected in exhibit No. 3 of Staff Counsel Exhibit L. The percentage of erection completion appears in the production analysis reports of Sun and relevant parts are contained in Staff Counsel Exhibit V.

have had but for the interchange of hulls. Consequently, it appears that the interchange of Hulls 628 and 629 was the principal cause of delay in the construction schedule plan for a February 1964 launch of the first USL vessel.

Further contributing to the delay in that construction schedule were certain other delay factors cited by the Board's Representative and by us in the finding herein that Sun would not have delivered the USL vessels on its early delivery schedule even absent the changes. These delay factors occurred before or during the time of layoffs and included work resulting from the single engine addendum signed on February 25, 1963, and the lateness in preparation of plans for an Atlantic Refining tanker delaying engineering on the USL vessels. The quarters and automation changes may have had some adverse effect on the stage of construction planned for the scheduled launch of the first USL vessel, but in view of the delay caused by the interchange of hulls and the delay caused by other factors for which Sun is responsible, we consider any delay to that schedule caused by the changes to have been insignificant.

Therefore, since Sun by its own actions would not have had the USL vessel at a stage of construction where it could have received the laid off personnel Sun has failed to establish a causal connection between the changes and the layoffs. Accordingly, Sun is not entitled to recover its claimed hire-fire costs.

V. Interest.

Aside from the basic hardware costs and the delay associated costs claimed to have been caused by the changes, Sun requests the Board to direct USL to pay interest on that portion of the award which it considers

to be liquidated or capable of computation. Sun does not "press its claim" for interest against MarAd "at this stage of the proceedings" since it is "apparently disabled by statute from recovering any interest from MarAd." [39]

Sun urges, however, that it should recover interest from USL on the amount which USL has conceded from the beginning is due from the date of contract completion, on the additional amount which the Contracting Officer awarded from the date of his award and on the amount which the Board awards in this decision until the date of payment. Sun argues that interest is payable on these amounts because they were liquidated or capable of computation.

We disagree with Sun's basic contention that any amount owing for the changes is liquidated prior to the date the determination of the Board becomes final. Article 31 of the General Provisions of the Contract provides that a contractor cannot demand payment of an amount "until after the Board's decision if the payment in question is the subject of the [disputes] appeal." [40]

Until the Board's decision is final, payment cannot be demanded and no amount can be considered to be liquidated. Accordingly, Sun's request for interest to be levied against USL is denied.

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39. Sun is correct in concluding that interest is not recoverable against the United States under 28 U. S. C. § 2516(a) (1964), unless a contract or Act of Congress specifically provides for its payment. *United States v. Thayer-West Point Hotel Co.*, 329 U. S. 585, 590 (1947); *Algonac Mfg. Co. v. United States*, 428 F. 2d 1241, 1252 (Ct. Cl. 1970).

40. This fact that a demand for payment cannot be made until after a decision of the Board distinguishes this case from *Swartzbaugh Mfg. Co. v. United States*, 289 F. 2d 81 (6th Cir. 1961), relied on by Sun. In that case the Government under the contract could, and did, demand payment after the Contracting Officer's decision.

CONCLUSION.

The Exceptions filed by Sun, USL, and Staff Counsel to the Recommended Decision and Recommended Order of the Board's Representative for this dispute are denied or sustained to the extent indicated in the foregoing discussion and for the reasons stated therein. Our findings and conclusions with respect to each controverted cost Sun claims it incurred under this Contract by reason of performance of work pursuant to Changes Nos. 23 and 48 are stated in the foregoing discussion and therefore, need not be repeated at this point. Accordingly, we find and conclude that Sun is entitled to recover the following award in this dispute. Where indicated it is based on 50,000 estimated production hours (excluding electrical labor). From the record the exact number of these hours apparently defies exact calculation. To avoid undue controversy on this matter and to permit any necessary possible mathematical correction in the award, we request that Sun on or before September 7, 1971, submit and serve on opposing parties its computation of production labor hours (excluding electrical labor) and any matter related to the award. We request that any reply thereto by USL and/or Staff Counsel be submitted within 10 days of the service date of Sun's submission. Thereafter, an order will be issued stating the exact award to which Sun is entitled.

AWARD.

HARDWARE COSTS	
Material	
Automation	$ 950,000
Quarters	2,226
Engineering Labor	287,431.71
Production Labor	
Cable Installation	334,031.46
Other	305,085 *
Sea Trial	29,952.97
Associated Costs	61,000
	$1,969,727.14*
DELAY ASSOCIATED COSTS	
Insurance	$ 15,378
Labor Escalation	38,111.86
Services	42,327.07*
Unabsorbed Overhead	236,690.78*
Overtime	80,800
Engineering Disruption	58,824
Production Disruption and Congestion	110,000
	$ 582,131.71
Sub-Total	$2,551,858.85*
10% Profit	255,185.88
Total	$2,807,044.73*

SO ORDERED BY THE MARITIME SUBSIDY BOARD
Date: August 11, 1971

JAMES S. DAWSON, JR.
James S. Dawson, Jr.,
Secretary.

* Based upon 50,000 estimated production hours (excluding electrical labor). To be adjusted when exact number of hours determined.

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

DOCKET NOS. CA-62 AND CA-63

SUN SHIPBUILDING AND DRY DOCK COMPANY

v.

U. S. LINES, INC.

In the matter of cross appeals from a decision of the Contracting Officer concerning the fair and reasonable value of work performed by Sun Shipbuilding and Dry Dock Company pursuant to Changes Nos. 23 (centralized control of engine room and bridge control of main engine) and 48 (modification of crew accommodations) on five C4-S-64a design type vessels constructed for United States Lines, Inc. under Contract No. MA/MSB-11.

ORDER OF THE MARITIME SUBSIDY BOARD DETERMINING FINAL AWARD.

Served Upon:

John J. Runzer, Esq., c/o Pepper, Hamilton and Scheetz, 123 South Broad Street, Philadelphia, Pennsylvania 19101 for Sun Shipbuilding and Dry Dock Company.

Louis J. Gusmano, Esq., William J. O'Brien, Esq., and *John R. Geraghty, Esq.*, c/o Kirlin, Campbell & Keating, 120 Broadway, New York, New York for United States Lines, Inc.

Robert A. Garske, Esq., Robert J. Gomez, Esq., Staff Counsel, Maritime Administration, Washington, D. C.

This Order will settle the exact award Sun Shipbuilding and Dry Dock Company ("Sun") is entitled to recover under the Board's Opinion and Order served in this proceeding on August 25, 1971. It will thereby render "final" that Opinion and Order.

The decision served on August 25, 1971, found and concluded that Sun was entitled to recover $2,807,044.73 inclusive of profit for work performed in accordance with Changes Nos. 23 and 48 under Contract No. MA/MSB-11 for construction with the aid of construction-differential subsidy of five C4-S-64a vessels for United States Lines, Inc. ("USL"). This award was subject to adjustment inasmuch as it was based upon 50,000 estimated production hours (excluding electrical hours). Sun was requested to submit its computation of production labor hours (excluding electrical labor) and, "any matter related to the award." USL and Staff Counsel were given an opportunity to reply.

All parties have filed responses to this request indicating the following differences between the Board's computation of award and that of the parties:

Changes Costs	*Board*	*Sun*	*USL & Staff Counsel*
HARDWARE COSTS			
Materials-Quarters	$ 2,226	$ 6,226	$ 6,226
Other Production Labor	$305,085	$329,522.31	$297,672.14
DELAY ASSOCIATED COSTS			
Services	$ 42,327.07	$ 40,622.14	$ 42,843.59
Unabsorbed Overhead	$236,690.78	$330,804.28	$232,170.96

We accept the adjustment urged by the parties for the material costs for quarters noting it includes $4,000 indicated in the "Development" section of Sun's detailed estimate for Change 48.

The difference between the amount of other production labor urged by Sun and by USL and Staff Counsel is the inclusion of 5220 sea trial production hours in Sun's computation of production labor for Changes 23 and 48. Since these hours are reflected in the award for the sea trial, the same hours cannot be claimed again as part of other production hours. Accordingly, based upon the presentation of the parties and the determination that Sun has claimed exactly 48,784 hours in its detailed estimates for other production labor,* Sun is entitled to recover $297,665.33 for production labor under the basic changes costs (excluding clerical and sea trial hours). Also, as a result of this award for other production labor, services under delay associated costs are adjusted to $42,844.72 ($86,916.59 total additional services less $44,071.87 services allowed in the hardware award).

Sun's position on the unabsorbed overhead costs to be awarded is that the Board in directing the use of "the hull days per year utilized in USL Exhibit 33" (Decision, p. 61), directed the use of the actual hull days experienced by Sun's yard in 1963, 1964, and 1965 as shown in USL

* A check of Sun's detailed estimate for Change 48 reveals that 1044 hours were claimed in Part IV-Supplements rather than 1045 as indicated by the parties.

Exhibit 33. USL and Staff Counsel contend Sun misconstrues that direction and that it is plain the Board directed that the 6 hull yearly production rate be used "as representing 'the number of new hulls produced per year' element of the daily rate method formula." (Decision, p. 60). We found and concluded in the Opinion and Order served August 25, 1971, that the 6 hull capacity rate was the appropriate measure of "the number of new hulls produced per year" element in Sun's daily rate formula. The direction that the hull days per year utilized in USL Exhibit 33 be used in computing unabsorbed overhead was simply intended to note that that was an exhibit that contained figures utilizing the figures of 6 hull days per year. Therefore, based on the computations of the parties and adjustments for other production hours and services, Sun is entitled to recover $232,172.45 for unabsorbed overhead costs.

For the foregoing reasons, we find and conclude that under the Opinion and Order served August 25, 1971, Sun is entitled to recover the following final, adjusted award of $2,798,882.35:

FINAL AWARD

HARDWARE COSTS	
Material	
Automation	$ 950,000.00
Quarters	6,226.00
Engineering Labor	287,431.71
Production Labor	
Cable Installation	334,031.46
Other	297,665.33
Sea Trial	29,952.97
Associated Costs	61,000.00
	$1,966,307.47
DELAY ASSOCIATED COSTS	
Insurance	$ 15,378.00
Labor Escalation	38,111.86
Services	42,844.72
Unabsorbed Overhead	232,172.45
Overtime	80,800.00
Engineering Disruption	58,824.00
Production Disruption and Congestion	110,000.00
	$ 578,131.03
Sub-Total	$2,544,438.50
10% Profit	254,443.85
Total	$2,798,882.35

SO ORDERED BY THE
MARITIME SUBSIDY BOARD
Date: September 24, 1971

AARON SILVERMAN
Aaron Silverman
Assistant Secretary.

ORDER

(Secretary of Commerce, November 9, 1971)

In the Matter of: Compensation for Changed Work under Contracts for Construction of Five Ships, MSB Docket Nos. CA-62 and CA-63

Pursuant to Section 7.06 of Department Organization Order 10-8, the time provisions of that Order are hereby waived and the finality of the Maritime Subsidy Board's action in the above-entitled matter is hereby suspended until December 20, 1971, to enable our further consideration of the related but conflicting petitions for review filed with us by United States Lines, Sun Shipbuilding & Dry Dock Company, and American Institute of Merchant Shipping.

SO ORDERED

Secretary of Commerce

Date: November 9, 1971

ORDER

(Secretary of Commerce, January 5,1972)

In the Matter of: Compensation for Changed Work under Contracts for Construction of Five Ships, MSB Docket Nos. CA-62 and CA-63

Pursuant to Section 7.06 of Department Organization Order 10-8, the time provisions of that Order are hereby waived and the finality of the Maritime Subsidy Board's action in the above-entitled matter is hereby further suspended until January 20, 1972, to enable our further consideration of the related but conflicting petitions for review files with us by United States Lines, Sun Shipbuilding & Dry Dock Company, and American Institute of Merchant Shipping.

SO ORDERED

John F. Lynn
Acting Secretary of Commerce

Date: January 5, 1972

ORDER
(Secretary of Commerce, January 20, 1972)

THE SECRETARY OF COMMERCE
WASHINGTON, D.C. 20230

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ORDER.

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In the Matter of: Compensation for Changed Work under Contracts for Construction of Five Ships, MSB Dockets Nos. CA-62 and CA-63.

The petitions of United States Lines, Sun Shipbuilding & Dry Dock Company, and American Institute of Merchant Shipping for review of the Maritime Subsidy Board decision in the above-entitled matter have been considered, and I have determined to modify that decision for the reasons and in the manner hereinafter indicated:

The departmental regulations governing Secretarial review provide that such review ". . . will not be granted unless significant and important questions of over-all policy requiring the Secretary's attention are involved or factual error in the Board's action." Accordingly Secretarial review of contract dispute determinations should be and is regularly denied because they usually involve considerations of a technical nature pertaining to ship construction or operation.

However, in this case with respect to certain items in dispute, the shipbuilder particularly protests that the Board's determinations differ from those recommended by the Board's representative who conducted the required proceedings for the presentation of evidence. In effect thereby a policy question has been raised as to the extent

to which the Board should be influenced by the examiner's recommendations.

It is my view with respect to a few of these claims which are not easily susceptible to mathematical or other precise calculation that the Board should not have departed from the examiner's findings for which there was substantial factual support. I recognize that in each of these instances the Board has set forth good reasons for its differing views but I am not persuaded under the particular circumstances that reversal of the examiner's conclusions is warranted. I have concluded, therefore, that the claim items relating to the extent of pre-contract delivery date delay, the estimated number of service hours per month during the delay period, and the estimates of disruption effect in terms of production and congestion, should be disposed of in accordance with the examiner's views. In all other respects, I affirm the Board's decision including the several other instances in which it departed from the examiner's recommendations.

I would further state that this decision and the reasons therefore relate only to contract dispute cases and not to any other matters coming before the Board and its examiners in the administration of the merchant marine program.

Pursuant to this decision petitioner, Sun Shipbuilding & Dry Dock Company, is entitled to award in the amount of $3,070,547.95, as follows:

Hardware Costs	$1,966,307.47
Delay Associated Costs	
Insurance	15,378.00
Labor Escalation	54,185.00
Services	106,888.73
Unabsorbed Overhead	384,024.03
Overtime	80,800.00
Engineering Disruption	58,824.00
Production Disruption and Congestion	125,000.00
	825,099.76
Sub-Total	2,791,407.23
10% Profit	279,140.72
TOTAL	$3,070,547.95

SO ORDERED

MAURICE H. STANS
Maurice H. Stans
Secretary of Commerce

Date: January 20, 1972

ORDER
(Secretary of Commerce, February 15, 1972)

THE SECRETARY OF COMMERCE
WASHINGTON, D.C. 20230

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ORDER.

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In the Matter of: Petitions for Reconsideration of the Secretarial Order dated January 20, 1972, regarding compensation for changed work under contracts for construction of five ships, MSB Dockets Nos. CA-62 and CA-63.

The petitions of United States Lines, Inc (USL), dated February 7, 1972, and the Liner Council, American Institute of Merchant Shipping (AIMS), dated February 8, 1972, for reconsideration of the Order of the Secretary in the above-entitled matter have been reviewed.

Both petitioners complain that the Order does not expressly treat with the legal issue between the petitioners and the Sun Shipbuilding & Dry Dock Company (Sun) concerning the allowability only of the direct cost of changed work as distinguished from disruption or delay costs. USL's petition for reconsideration similarly refers to the separate legal issue whether the contractual requirement for a shipbuilder to furnish preliminary estimates of the cost of proposed changes precludes the ultimate recovery of additional costs.

Both of these legal issues among several others were set forth at considerable length by AIMS and USL in their original petitions for Secretarial review as well as in the challenged decision of the Maritime Subsidy Board. In my Order I stated that I had considered such petitions and had concluded to modify the Board's decision only as it related to three specified claim items, and went on to say:

Order
(Secretary of Commerce, February 15, 1972)

". . . In all other respects, I affirm the Board's decision including the several other instances in which it departed from the examiner's recommendations."

I have not overlooked the further statement in the AIMS petition for reconsideration to the effect that my Order contained only a partial quotation from the regulations concerning the scope of Secretarial review and that the omissions possibly reflected an intention to limit such review contrary to the regulations. I would, therefore, now affirm that such was not my intention, that in fact the petitions were considered in their entirety, and that except as related to the three claim items, I intended and did uphold the Board's decision as indicated above, "In all other respects, . . ."

So Ordered

Maurice H. Stans
Maurice H. Stans
Secretary of Commerce

Date: February 15, 1972

U.S. COURT OF CLAIMS ORDER
May 31, 1974

IN THE
UNITED STATES COURT OF CLAIMS

No. 61-73.

SUN SHIPBUILDING & DRY DOCK CO.

v.

THE UNITED STATES

Before Cowen, *Chief Judge*, Skelton and Kunzig, *Judges*.

ORDER.

This case comes before the court on plaintiff's Motion for Summary Judgment on Count I of plaintiff's First Amended Petition and on defendant's Cross Motion for Summary Judgment thereon.

This is a tri-partite ship subsidy case wherein the plaintiff, Sun Shipbuilding Company, contracted to build certain ships for United States Lines (USL), the shipowner, and USL and the defendant, United States, acting through the Maritime Subsidy Board (Board), each agreed to pay a proportionate part of the costs. During the performance of the contract, two change orders were made and a dispute arose as to the amount due the plaintiff by reason of the change orders. A decision was issued by the Board, as modified by the Secretary of Commerce (Secre-

tary). The defendant paid its part of the award, but USL refused to do so, claiming it was excessive for various reasons. The plaintiff then demanded that the defendant pay USL's part of the award, claiming that the contract required it to do so. When the defendant refused, the plaintiff filed this suit, contending in Count I of its petition that it is entitled to summary judgment against defendant for the amount of the Board's award, including USL's part. In Count II of the petition, plaintiff seeks to increase the amount of the award of th Board, as modified by the Secretary. The defendant made USL a third party defendant by having a notice issued to it under Rule 41. USL has appeared and filed pleadings in which it asserts various defenses to the award of the Board, contending it is excessive, and contesting plaintiff's attempt to increase the Board's award. USL's defenses are directed to Count I as well as to Count II of plaintiff's petition.

The court issued an order today in granting USL's request for review of the trial judge's order of December 20, 1973, in which the trial judge partially allowed plaintiff's motion to strike the Second Affirmative Defense of USL. The court reversed the decision of the trial judge and held that under 41 U. S. C. § 114(b) and Rule 41, USL as a properly noticed third party defendant, "is free and competent to present any *defense* it wishes to both counts of the petition," citing *Bowser, Inc. v. United States and General Steel Tank Co.*, 190 Ct. Cl. 441, 445-46, 420 F. 2d 1057, 1060-61 (1970). The court further held that a third party defendant is not restricted to assisting the defendant, but, as stated in the *Bowser* case, may also "offer additional evidence on its own behalf and advance such legal contentions as it deems appropriate in the protection of its interest."

In so holding the court observed:

> Insofar as the points raised in the Second Affirmative Defense may, if accepted by the court, tend to show, in addition to the lack of merit in plaintiff's claim for an additional award, that the Secretary's award was itself excessive or erroneous, the third party will not be able in this litigation to obtain an affirmative judgment to that effect or reducing the award. (The separate question of the impact of the doctrine of collateral estoppel on a future private suit between third party and plaintiff will be for the other tribunal to determine.)

Because third-party's defenses might result, through collateral estoppel, in reducing the Board's award to plaintiff, that award cannot be viewed as a "final" one to which plaintiff is entitled at this time as a matter of law.

The court concludes that it necessarily follows that plaintiff's Motion for Summary Judgment on Count I must be denied. Count II is not before us for decision.

Accordingly, Plaintiff's Motion for Summary Judgment on Count I is denied and Defendant's Cross Motion for Summary Judgment on Count I is granted and Count I is dismissed from plaintiff's petition, and the case is remanded to the trial judge for trial on Count II of plaintiff's petition.

By THE COURT

Wilson Cowen,
Chief Judge.

May 31, 1974

ORDER DENYING CERTIORARI
November 18, 1974

IN THE
SUPREME COURT OF THE UNITED STATES

No. 74-195.

SUN SHIPBUILDING & DRY DOCK CO.
petitioner,
v.
UNITED STATES.

Petition for Writ of certiorari to the United States Court of Claims.

Nov. 18, 1974. Denied.

U.S. COURT OF CLAIMS *EN BANC* ORDER
May 31, 1974

IN THE UNITED STATES COURT OF CLAIMS

No. 61-73

SUN SHIPBUILDING & DRY DOCK CO.

v.

THE UNITED STATES

Before COWEN, *Chief Judge,* DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges.*

ORDER

This case comes before the court en banc on the request (filed January 16, 1974) of United States Lines, Inc., third party, for review of the order of Senior Trial Judge Mastin G. White (filed December 20, 1973) partially allowing plaintiff's motion to strike the Second Affirmative Defense and the "Wherefore" clause from the third party's answer. The matter has been submitted on the briefs and oral argument of counsel for the third party and the plaintiff. The defendant has not participated in this aspect of the case.

United States Lines entered this litigation and became party after the defendant moved that a notice be issued to it under Rule 41; this motion was allowed without objection by plaintiff and the notice was duly issued and served. Under this court's third party statute (41 U.S.C. § 114(b)) and Rule 41, a third party defendant which becomes such pursuant to this type of notice is entitled to present its full defense to the plaintiff's claim. It is not restricted to assisting the defendant but may also "offer additional evidence on its own behalf and advance such legal contentions as it deems appropriate in

the protection of its interest." *Bowser, Inc. v. United States and General Steel Tank Co.*, 190 Ct. Cl. 441, 445-46, 420 F.2d 1057, 1060-1061 (1970). The theory of both statute and rule requires that the third party defendant be free to make its full defense to the plaintiff's claim, so that repetitious and piecemeal litigation be minimized to the greatest extent compatible with the limited jurisdiction this court has with respect to disputes between private parties. See *id.*, 190 Ct. Cl. at 445-47, 420 F.2d at 1060-61. It follows that third party, having been duly noticed in without objection and having become a party to the entire case, is free and competent to present any *defense* it wishes to both counts of the petition. At the same time, third party is not entitled to seek any affirmative judgment, either monetary or declaratory, against the plaintiff. *Rolls-Royce Ltd. v. United States*, 176 Ct.Cl. 694, 364 F.2d 415 (1966).

With respect to Count II of the petition, the issues raised by United States Lines Second Affirmative Defense all go toward defeating plaintiff's claim for an additional award over and above that granted by the Secretary. The Defense presents grounds for rejecting the claim which are additional and cumulative to those advanced by defendant. The Defense may therefore be pursued in this court by the third party for the purpose of defeating or reducing plaintiff's claim for more money. However, third party does not ask for any affirmative relief against plaintiff in this case, and expressly disavows any such relief. As indicated above, such relief is in any event not available here. Insofar as the points raised in the Second Affirmative Defense may, if accepted by the court, tend to show, in addition to the lack of merit in plaintiff's claim for an additional award, that the Secretary's award was itself excessive or erroneous, the third party will not be able in this litigation to obtain an affirmative judgment to that effect or reducing the award. (The separate question of the impact of the doctrine of collateral estoppel on a future private suit between third party and plaintiff will be for the other tribunal to determine.)

With regard to Count I of the petition, the court's order of today's date dismissing that count, on consideration of the plaintiff's and defendant's cross-motions for summary judgment on the count, meets the problem of the effect of the third party's Second Affirmative Defense on that count.

IT IS THEREFORE ORDERED THAT third party United States Lines' request for review of the trial judge's order of December 20, 1973, is granted, the order is reversed, the third party's Second Affirmative Defense is allowed to stand with respect to Count II for the purpose stated above, and the case is returned to the trial division for further proceedings.

WILSON COWEN
Wilson Cowen
Chief Judge

May 31, 1974

FINAL ORDER, COURT OF CLAIMS
May 28, 1976

IN THE

United States Court of Claims.

—

No. 61-73.

—

SUN SHIPBUILDING & DRY DOCK CO.

v.

THE UNITED STATES.

—

Before DAVIS, *Judge*, Presiding, LARAMORE, *Senior Judge*, and KASHIWA, *Judge*.

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ORDER.

This case comes before the court on the three parties' (plaintiff, defendant, third-party United States Lines) requests for review of the recommended decision of Trial Judge Mastin G. White, filed October 14, 1975, with respect to the parties' cross motions for summary judgment on Count II of the petition which is governed by the Wunderlich Act. Oral argument has been had and the briefs have been considered.

The court agrees with the Trial Judge's opinion (copies of which have been furnished to the parties) and adopts that opinion as the basis for its judgment, except for the so-called "Hire-Fire Costs" issue.

On that question the court does not agree with and does not accept the Trial Judge's opinion and conclusion, but determines instead that the final refusal of the Depart-

ment of Commerce to grant "hire-fire costs" was not arbitrary, capricious, or unsupported by substantial evidence. The Trial Judge relied mainly on the testimony of Sun's high officials to the effect that Sun had contemplated using the laid-off outfitting men on the first United States Lines vessel, that it was the delay in launching of the first ship to be constructed under this contract which made it necessary for Sun to lay off these outfitting personnel in late December of 1963 and January and February of 1964, and that such delay was due to the disruption caused by the issuance of Change Orders 23 and 48. We conclude, on the other hand, that the Board and the Secretary of Commerce could permissibly find this conclusory and summary testimony outweighed by (1) the inability of Sun's Manager of Industrial Relations, who was supposed to support with detail the conclusions of the high officials, to tie the lay-offs specifically to Changes 23 and 48; (2) the fact that under its own original schedule Sun had anticipated a long delay (so long as to make it unlikely that it would have retained the workers in question) between the launching of the next previous vessel (the Atlantic Heritage) and the first of the five ships involved in the present contract; and (3) other simultaneous delay factors (including the interchange of the first two hulls), not attributable to Changes 23 and 48, for which Sun was itself responsible, and which would have made it improbable that the first United States Lines vessel would have been ready in time to receive the laid-off outfitting personnel from the Atlantic Heritage.

This disposition makes it unnecessary under the court's *en banc* order of May 31, 1974, to consider the arguments made by the United States Lines and the *amicus* as to the bearing on this case of *United States v. Rice*, 317 U. S. 61 (1940), and *United States v. Blair*, 321 U. S. 730 (1942), and the problem of so-called "delay

damages." Since we affirm the administrative award without adding to it, there are no possible offsets available in this court to the United States Lines; therefore we need not reach (and we take no position on) those issues.

IT IS THEREFORE ORDERED AND CONCLUDED that the determination of the Secretary of Commerce, insofar as properly challenged by the parties, was neither arbitrary, capricious, unsupported by substantial evidence, nor legally erroneous, and accordingly that the summary judgment motions of the defendant and the third party are granted, the plaintiff's motion is denied, and Count II of the petition is dismissed.

By THE COURT

OSCAR H. DAVIS
Judge, Presiding

MAY 28, 1976

ORDER DENYING CERTIORARI
November 29, 1976

IN THE
SUPREME COURT OF THE UNITED STATES

No. 76-284.

SUN SHIPBUILDING & DRY DOCK CO.
petitioner,
v.
UNITED STATES et al.

Facts and opinion, 538 F.2d 348.

Petition for writ of certiorari to the United States Court of Claims.

Nov. 29, 1976. Denied.

MEMORANDUM AND ORDER OF JUDGE CAHN
February 16, 1977

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 75-244

UNITED STATES LINES, INC.

v.

SUN SHIPBUILDING & DRY DOCK CO.

and

UNITED STATES OF AMERICA

Civil Action No. 75-2275

SUN SHIPBUILDING AND DRY DOCK CO.

v.

UNITED STATES LINES, INC.

MEMORANDUM AND ORDER

CAHN J. February 16, 1977

I. BACKGROUND AND FACTS

Before this court is the motion of Sun Shipbuilding & Dry Dock Co. ("Sun Ship"), the defendant in Civil Action No. 75-244, for summary judgment on the ground that an applicable statute of limitations is a complete bar to the causes of action of United States Lines, Inc. ("USL"). These consolidated cases involve subsidized shipbuilding contracts regulated under 46 U.S.C. §1151, *et seq.* Under the terms of the standard ship subsidy contract, the contractor is provided with the approved plans and is required to perform in strict compliance with such plans and specifications. The contracts in each cause

of action contain arbitration provisions for the resolutions of certian disputes that arise under the respective contracts.

The disputes in the case of *USL v. Sun Ship* involve delays in delivery and damages allegedly caused by construction deficiencies. In *Sun Ship v. USL,* Civil Action No.75-2275, the dispute concerns the cost of modifications allegedly requested by USL under certain provisions of the contract.

The issues now to be resolved in this case are: is the transaction between the parties one for the sale of goods so that the four year statute of limitations in 12A P.S. §2-725(1) is applicable, and what effect would the arbitration clauses have on the running of the statute of limitations.[1]

[1] Jurisdiction is conferred under 28 U.S.C. §1332. A federal court in a diversity case must apply the choice of law rules of the state in which it is sitting. Klaxon Co. v. Stentor Co., 313 U.S. 487(1941). The case of Neville Chemical Company v. Union Carbide Corporation, 422 F.2d 1205 (3d Cir. 1970), held that the Pennsylvania Supreme Court looks to the law of the place with the most significant relationship to the parties and to the transaction. *Accord,* Azriel v. Frigitemp Corporation, 397 F.Supp. 871 (E.D. Pa. 1975); Interpace Corporation v. Penbrook Hauling Co., Inc., 389 F.Supp. 560 (M.D. Pa. 1975). In the Neville case the court found that Pennsylvania had the greatest interest because it was: the place of the contract negotiations, the place where the contract was signed, the principal place of plaintiff's business and the place where a portion of the contract was to be performed. In this case, Pennsylvania has the most significant relationship to the transaction and to the parties. The defendant is incorporated in and its principal place of business is in Pennsylvania. In addition, Pennsylvania is the place where the contract is to be performed. Therefore, for all the above reasons, the Pennsylvania Uniform Commercial Code is the proper law to apply.

Furthermore, 12A P.S. §1-105 provides that if the parties fail to agree on the law that should apply, then the Pennsylvania Uniform Commercial Code applies to transactions bearing an appropriate relation to this state. The parties in this case did not stipulate which law was to apply and Pennsylvania is the state with the most appropriate relation to the transaction. Under 12A P.S. §1-105, the Pennsylvania Uniform Commercial Code is the body of law applicable to this transaction.

II. IS THE CONTRACT BETWEEN THE PARTIES ONE FOR THE SALE OF GOODS?

The Uniform Commercial Code as enacted by the Commonwealth of Pennsylvania provides that an action for breach of any contract for sale must be commenced within four years after the cause of action arose. 12A P.S. §2-725(1). However, this limitation of actions is applicable only to a transaction involving the sale of goods. The Code at 12A P.S. §2-105(1) defines goods as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than money in which the price is to be paid, investment securities . . . and things in action . . ."

Courts have had considerable difficulty in determining whether a contract is for the sale of goods where the contract provides for the supplying of labor and services in conjunction with the transfer of personal property. USL contends that the contract in question is essentially for services, and therefore, the four year statute of limitations contained in 12A P.S. §2-725(1) is not applicable. This court concludes that USL's position as to the applicable statute of limitations is incorrect.

It is equally clear that the cases cited by Sun Ship for the proposition that the sale of a ship is the sale of goods under the Uniform Commercial Code — *R.C. Craig, Ltd. v. Ships of the Sea Incorporated*, 345 F.Supp. 1066 (S.D. Ga. 1972); *Prince v. LeVann*, 487 P.2d 959 (Alas. 1971) — are not controlling authority to dispose of the contested issues in this case, as those cases involve the sale of already built ships. The resolution of the issues before this court requires an analysis of cases involving contracts that require the performance of services in connection with the delivery of goods.

In *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974), the Eighth Circuit stated that if the items in question are tangible property normally in the flow of commerce, they are none the less "goods" even though service may play a role in their ultimate use. The court went on to say that services always play an important role in the use of goods,

whether in transforming the raw materials into a finished product as is the case here, or whether in helping to distribute the product to a point where it can be easily obtained. The mere fact that services are provided for in the contract does not automatically force the conclusion that the sale of goods is not involved. In its opinion the court said:

> Rather, the cases presenting mixed contracts of this type are legion. The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved . . .

Id. at page 960.

The case of *Computer Servicenters, Inc. v. Beacon Manufacturing Co.*, 328 F.Supp. 653 (D.S.C. 1970), *aff'd per curiam*, 443 F.2d 906 (4th Cir. 1971), provides additional insight as to what are goods, despite provisions in the contract for services. In that case, the court categorized the contract as one for services. The agreement called for the performance of data processing services. Payment contemplated was for analysis, storage and reporting of data. The parties did not contract for a finished product that required storage and reporting of data but merely for the service. As is apparent from the above-mentioned case, an important consideration is the purpose of the parties in contracting. It seems clear from a review of the contract provisions in this case that the parties were contracting for completed ships.

It is true that USL provided the plans and made certain modifications in the plans according to the contract terms, but this conduct seems to fall within the exception for specially manufactured goods in the Uniform Commercial Code. 12A P.S. §2-105(1). The situation in the case before this court appears to be analogous to that in *Aluminum Company of America v. Electro Flo Corp.*, 451 F.2d 1115 (10 Cir. 1971), where plaintiff undertook a contract to

design and produce an electrified revolving floor that would meet plaintiff's requirements. In response to defendant's contention that the contract was merely for services, the court said that while the transaction involved some engineering and design aspects, the contract in reality involved a sale of goods. The court further said that the services were for the purpose of enabling the defendant to fulfill plaintiff's requirements for the goods. Plaintiff in that case did not order or contract merely for services; its offer to plaintiff was for the completed product.

It is fair to conclude from these cases that a contractual item can still be "goods" under the Uniform Commercial Code if it requires the furnishing of both goods and services and also if the item is specially manufactured and designed. As stated in *Bonebrake, supra,* nearly every "good" requires some assembly of raw materials for the completion of a finished product or requires the provision of some services to make the item operable. Therefore, the resolution of this issue requires the court to look to what was the predominant factor in the contract and what was the intent of the parties.

It is clear from the provisions in the contract before this court that the predominant item contracted for was the delivery of completed ships and that the purchase of completed ships was the primary intent of the parties. This intent can be domonstrated by reference to several contractual provisions. The contract requires Sun Ship to provide everything necessary to build and deliver completed ships at its own risk and expense.[2] This demonstrates the parties intended to contract for the delivery and receiving of completed ships. The parties were not contracting for labor or materials or any of the other components that go into the construction of a ship but rather for a completed product. The contract provides

[2] Part II General Provisions (approved May 9, 1967) referred to and incorporated by reference in Construction Contracts No. MA/MSB-70, executed May 1, 1968, and No. MA/MSB-87, executed September 3, 1969, Article 1.

for damages for delay in delivery[3] and for the testing[4] of the completed ships with guarantees[5] as to the performance of the vessel. If the parties had intended to contract for labor and services they would not have provided for damage provisions based on the performance of a finished product. The provisions do not focus on the quality of the service but rather on the performance of the completed product. The more logical conclusion is that the above-mentioned guarantees and liquidated damages provisions reflect that the parties' intent was to contract for finished goods. These provisions show that USL looked to completed ships as the product of their contract and such ships were the end product and purpose of the contract.

It follows from our conclusion that these contracts involved the sale of goods under §2-105 of the Code and that the statute of limitations found in §2-725(1) of four years apply to these transactions.

III. IS THE FOUR YEAR STATUTE OF LIMITATIONS STAYED BY THE ARBITRATION CLAUSE?

In the action of *Sun Ship v. USL,* the contract provides in Article 36:

> Any dispute arising under this contract which is not disposed of by agreement of the parties to this contract, *shall* be decided by the Chief, Office of Ship Construction . . . which shall be final and conclusive and shall bind all parties to this contract . . . (Emphasis supplied.)

This contract provides for a mandatory review by the Chief, Office of Ship Construction and a written review by the Maritime Board ("Board"). The decision of the Board is final and conclusive on any question of fact unless it is found to have been fraudulent, capricious, arbitrary or grossly erroneous by a court of competent jurisdiction. Under this contract the finding of facts concerning any

[3] *Id.* at Article 8.

[4] *Id.* at Articles 13 and 14.

[5] *Id.* at Article 17.

dispute under the contract is delegated to the arbitration process with a limited judicial review.

The above-mentioned arbitration clause must be compared to the one present in the *USL v. Sun Ship* case (which is the contract involved in the summary judgment motion presently before this court). Article 41 of the relevant contract provides:

> Any action, omission, direction, decision or determination . . . of the Board, the Owner or the Contractor arising under, or out of the performance or the administration of this Contract, . . . or any question of the right of any party arising under or out of the preformance or administration of his contract *may* be the subject of a dispute under this Article 41. Such a dispute *may* be initiated at any time within sixty (60) days after the occurence of the disputed action . . . (Emphasis supplied.)

In addition, this article provides that if the Chief, Office of Ship Construction, states that his decision is final, then such decision shall be final and conclusive as to all questions of fact unless a written appeal is taken to the Board. Article 41(d) states that any question of fact resolved by the Board shall be final and binding upon the parties unless a court of competent jurisdiction determines that the conclusions of the Board were fraudulent, capricious, arbitrary, grossly erroneous as to imply bad faith or not supported by substantial evidence. The terms in both contracts are similar, except that the invoking of the arbitration proceeding in the contract involved in the *USL v. Sun Ship* action is not mandatory as it is in the *Sun Ship v. USL* case. From what we have considered thus far, when the arbitration provision is invoked in the *USL v. Sun Ship* contract it is as binding on the parties as in the first.

A major difference between the two arbitration procedures becomes apparent when subsection (e) of Article 41 of the *USL v. Sun Ship* contract is considered. This subsection provides that notwithstanding any other subsection of Article 41, if the Chief, Office of Ship Construction in a final decision determines that the Board has no

monetary interest in a particular dispute and that the dispute is solely between the contractor and the owner, the decision of the Chief shall not be final and conslusive and binding upon the parties, and no appeal to the Baord shall be taken from the Chief's decision. Therefore, if the voluntary procedures are invoked by one of the parties to the contract, the findings of fact of the arbitration proceedings are binding on the parties unless the Chief determines that the Board has no financial interest.

Under the *USL v. Sun Ship* contract there are three possibilities for court involvement:

(1) Where none of the parties decide to invoke the arbitration proceedings and the factual issues are determined by a court of competent jurisdiction;

(2) Where the arbitration proceedings are invoked, but the Chief determines that the Board has no financial interest in the dispute; under these circumstances none of the parties are bound by the Chief's determinations and a court of competent jurisdiction may decide all issues presented in the dispute;

(3) Where the arbitration proceedings are invoked and the Board has a financial interest; under these circumstances the administrative finding of facts is binding on the parties and the only issues that can be presented to a court are those of a limited appeal.

Under the facts presented in the case of *USL v. Sun Ship*, the case falls within the second possibility mentioned above. The question that remains for this court to decide is whether the statute of limitations is tolled by the administrative proceeding in that case.

An analysis of this issue should begin with the case of *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967). The *Crown Coat* case involved a contractual clause making the settlement of disputes arising under the contract subject to resolution by arbitration. The contract further provided that the findings of fact made during the arbitration procedure shall be binding on the parties, un-

less determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious or so grossly erroneous as to imply bad faith.

The Supreme Court in *Crown Coat* held that the statute of limitations did not begin to run until the arbitration proceeding was completed. The Court held that the role of the courts is to review the administrative process, and no action can be brought until the administrative action is completed. Therefore, the cause of action first accrues when the arbitration proceeding is completed.

A similar approach is taken in the case of *United States v. Birmingham Fire Insurance Co. of Pa.*, 370 F.Supp. 501 (W.D. Pa. 1974), involving the same type of dispute clause that was found in the *Crown Coat* case. There the court looked to the time when the parties could first bring suit and to the scope of the court's review. The court went on to say, at page 503:

> [T]he administrative appeals procedure constitutes a systematic approach to the resolution of disputes arising out of government contracts which is equally binding upon the United States and private contractors. Even though, in this instance, the dispute resolution mechanism was activated by the private contractor, neither the government nor the private contractor could have filed a complaint in United States District Court until the administrative procedure had been exhausted.

The court held that where a mandatory administrative appeals procedure is required by the contract, the statute of limitations does not accrue until the administrative appeal is completed *See also Bethlehen Steel Corporation v. Grace Line Inc.*, 416 F.2d 1096 (D.C. Cir. 1969); *Zidell Explorations, Inc. v. United States*, 427 F.2d 735 (Ct.Cl. 1970); *Wolak v. United States*, 366 F. Supp. 1106 (D.Conn. 1973).

The case of *Cosmopolitan Manufacturing Co. v. United States*, 297 F.2d 546 (Ct.Cl. 1962), held that where the court's scope of review in a suit under the contract was limited to whether the decision of the Board of Appeals was arbitrary and capricious, the cause of action

accrues at the time the Appeals Board decision is rendered. It is at the time that all the events occurred which were necessary for the court to make its decision. Clearly under this standard, the statute of limitations in a case involving the type of arbitration clause present in *Sun Ship v. USL* does not begin to run until after the administrative procedure was completed.

This brings us to the more difficult question presented in *USL v. Sun Ship* where the invoking of the arbitration procedure was voluntary. In *Unexcelled Chemical Corp. v. U.S.*, 345 U.S. 59 (1953), the United States brought suit to recover liquidated damages under the Walsh-Healey Act (41 U.S.C. §35 *et seq.*). The Act provides that a contractor furnishing the Government materials, supplies, etc., must meet specific labor standards. The Act requires the Secretary of Labor to make investgations, reach findings, issue complaints and hold hearings. The Supreme Court held that the cause of action accrued at the time of the violation giving rise to the cause of action. The Court's rationale, and what distinguishes the *Unexcelled Chemical* case from *Crown Coat*, was that the findings of damages or validity of the cause of action was not to be made by an administrator. The action in court was not to be merely an appeal of the arbitrator's decision, but a hearing *de novo* on the merits.

The analysis in the case before this court can best be approached by first looking at the situation where the initiation of the arbitation is voluntary but the Board has a financial interest (where the Chief determines that the Maritime Board has a financial interest, the only remaining course of action is an administrative review by the courts). In a case where the Board has a financial interest, the *Crown Coat* situation is analogous. If that hypothetical were before this court, the logical conclusion would be that the cause of action does not accrue until after the administrative procedure has been completed.

That leaves this court with the question of what is the effect of subsection (3) of Article 41 (discussed *supra*) on

the above-mentioned conclusion. Until the Chief renders his decision, USL does not know whether it is in a situation where it is entitled to a *de novo* court hearing or to a limited administrative review. It is not equitable nor conducive to efficient judicial procedure to require USL to file suit to protect their cause of action while awaiting the decision of the Chief. In our situation, USL was following the procedures required to protect the interest of the United States in the matter and should not be penalized for such action.

Finally, any other solution would result in judicial waste and confusion, as the District Court would not know the correct posture of the cause of action until the Chief has rendered his decision. Therefore, the logical conclusion is not to require USL to file its suit until after the Chief makes a decision on whether or not the United States has a financial interest in the dispute. It is clear that a cause of action does not accrue until all events have occurred which are necessary for a court to fix liability on the defendant. *Cosmopolitan Manufacturing Co. v. United States, supra.* Under the circumstances present in the instant litigation, such a situation will not exist until the Chief renders his decision as to whether the Board has a financial interst and that therefore, the administrative findings are binding on the parties. Since that is the case, I find that the causes of action accrued in the case of *USL v. Sun Ship* at the time the Chief, Office of Ship Construction rendered his decision on each dispute.

Since all causes of action alleged by USL have been filed within four years of the aforesaid relevant administrative determination, Sun Ship's motion for summary judgment will be denied.

Edward N. Cahn, Jr.

ORDER FOR PARTIAL SUMMARY JUDGMENT
June 27, 1977

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 75-2275

SUN SHIPBUILDING & DRY DOCK CO.

v.

UNITED STATES LINES, INC.

PARTIAL SUMMARY JUDGMENT

This case having come before the Court on cross motions for summary judgment, and the parties having been heard.

And plaintiff, having filed an oral motion for an Order of partial summary judgment with respect to that portion of plaintiff's claim against USL pertaining to the hardware costs arising out of change orders 23 and 48, as determined by the order of the Secretary of Commerce in MA/MSB Dockets CA-62 and CA-63 dated January 20, 1972.

And it appearing to the Court that defendant does not object to the entry of said Order without prejudice to defendant's position that no amount of a change order is due and owing until the full amount is finally determined and to its positions additionally set forth in its motion for summary judgment including that no prejudgment interest is due.

And, it further appearing to the Court there is no disagreement as to the amount of defendant's share of said hardware costs.

Elizabeth Johnson
Deputy Clerk, United States District Court
Eastern District of Pennsylvania

Dated: 7/8/77

It is therefore, this 27 day of June, 1977, ORDERED that partial summary judgment in favor of plaintiff be entered in the amount of $460,106.03 representing the balance not paid of one hundred and ten percent (110%) of said hardware costs [as provided in MA/MSB-11]. Satisfaction of said judgment will constitute a full release of defendant's liability for one hundred and ten percent (110%) of said hardware cost.

It is further ORDERED that this Order shall be without prejudice to the positions set forth in cross motions for summary judgment filed by each of the parties herein.

Edward N. Cahn, J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 75-2275

SUN SHIPBUILDING & DRY DOCK CO.

v.

UNITED STATES LINES, INC.

MEMORANDUM AND ORDER

CAHN, J. November 1, 1977

I. INTRODUCTION

Plaintiff Sun Shipbuilding and Dry Dock Company ("Sun") and defendant United States Lines, Inc. ("USL") have filed cross-motions for summary judgment. Plaintiff alleges that it is entitled to $926,617.17[1] in contract damages as well as substantial interest charges dating from January 1, 1966. Defendant contends that as a matter of law it has no further contract liability and that in any event plaintiff is not entitled to recover interest for any period prior to this court's final decision. I have concluded that plaintiff's motion should be granted and defendant's denied.

II. FACTS

Plaintiff is a shipbuilding company. In late 1962, plaintiff entered into a tripartite agreement with defendant

[1] USL has stipulated that it is liable for a portion of this basic contract liability, *see* Sun Shipbuilding and Dry Dock Co. v. United States Lines, No. 75-2275 (E.D. Pa. June 27, 1977), but has denied liability for interest on that sum.

and the United States Maritime Administration pursuant to the Ship Construction Subsidy Program, 46 U.S.C. §1101 *et seq.*, to construct five cargo vessels. Under the contract, the Maritime Administration obligated the United States Government to pay 48.6 percent of the contract price, and defendant agreed to pay the remaining 51.4 percent. Following a series of legal battles, the Government fully satisfied its obligation; only defendant's share is at issue in this case.

Under the terms of the contract, USL and the Government were entitled to order changes unilaterally in the construction of the vessels. The contract provided arbitration procedures for determining plaintiff's compensation for increased costs due to such modifications.[2]

Pursuant to these contract terms, USL ordered Sun to undertake two substantial changes in the construction of the ships. Sun diligently performed the necessary work. On November 24, 1965, two months after its delivery of the final vessel, Sun submitted a $5,000,000 claim for additional compensation. On November 13, 1967, the Division of Estimates found plaintiff's actual costs to be $1,700,000. On appeal, the Office of Ship Construction redetermined the costs and found them to be $2,200,000. An appeal by both parties to the Maritime Subsidy board resulted in an increase of the plaintiff's compensation to $2,798,882.35 on September 24, 1971. Finally, on January 20, 1972, the Secretary of Commerce, upon consideration of another set of challenges by USL and Sun, again modified the award by increasing it to $3,070,547.95. Plaintiff appealed this award to the Court of Claims with respect to the Government's share. The Court of Claims affirmed the Secretary's decision on May 28, 1976.

[2] Under the contract and the Maritime Administration's procedures, plaintiff's added compensation was to be one hundred ten percent of plaintiff's added cost. These costs were to be determined in the first instance by the Maritime Administration's Division of Estimates and the Office of Ship Construction. Those determinations were appealable to the Maritime Subsidy Board and thereafter to the Secretary of Commerce.

During this entire period, Sun still had recovered no compensation from the defendant for the costs of the changes defendant had unilaterally ordered. Furthermore, USL has, to date, not paid its full share of the change costs which it concedes are owed. Upon plaintiff's demand for payment in 1972, USL did offer to pay its share of the administrative award if plaintiff would waive its right to appeal the award of the Maritime Subsidy Board. But at no time after the Secretary of Commerce increased the award did defendant offer to satisfy plaintiff's full claim, along with the interest plaintiff alleged was due.

III. ISSUES

Plaintiff's alternative claims raise several issues:

1. Is Sun entitled to prejudment interest from January 1, 1966—a reasonable time after it submitted its final estimate of costs—on the full amount awarded?

2. If not, is Sun entitled to prejudgment interest from September 24, 1971—the date of the Maritime Subsidy Board's final award—on the full amount awarded?

3. Is Sun at least entitled to prejudgment interest from January 1, 1966, on the amount USL conceded was due?

Defendant's lengthy reply claims that no interest is recoverable because Sun's claim was not liquidated prior to the Secretary's decision and no prejudgment interest can be recovered on an unliquidated debt. USL also contends that the contract imposes no liability whatsoever on it until all "disputes" with respect to the contract are settled, and thus no interest can be charged prior to this court's final decision.

USL's cross-motion raises the following procedural issues:

1. Did a Court of Claims ruling concerning plaintiff's claims against the United States determine plaintiff's interest claim and thus estop the similar claim in this case?

Alternatively, does Sun's presentation of its case to the Court of Claims operate as a waiver of Sun's interest claim in this action?

2. Is the United States an indispensable party to this action, such that this court cannot decide the issues before it unless the United States is joined?

3. Does Sun's failure to accept USL's payment offer in 1972 preclude any claim for interest.

USL also raises a number of substantive challenges to the award of the Secretary itself:

1. Did the Secretary err as a matter of law in awarding Sun compensation for delay costs?

2. Did the Secretary err as a matter of law in awarding Sun compensation for delay costs relating to delay occurring before the final contract due date?

3. Did the Secretary err as a matter of law in awarding in excess of three million dollars in view of the fact that USL relied on Sun's lower original estimate of costs?

IV. INTEREST[3]

A. Should Prejudgment Interest Be Awarded?

Ordinarily the issue of whether prejudgment interest should be awarded to a claimant under a contract depends on whether the claim was liquidated or unliquidated at the time it was brought. The time when USL's debt became liquidated in this case—that is, when it was "finally" ascertained or capable of ascertainment with mathematical precision—is a matter which the parties have vigorously disputed.

The two rules for prejudgment interest are similar under Pennsylvania and federal law. If a claim is liqui-

[3] The parties agree and I have decided in an earlier decision in this case that Pennsylvania law should be applied. Sun Shipbuilding v. United States Lines, p.2 at n.1 No. 75-2275 (E.D. Pa. Feb. 16, 1977).

dated, the party whose payment or money has been withheld is entitled to prejudgment interest as a matter of right from the time the money became due or payable. *Eazor Express, Inc. v. Int'l Brotherhood of Teamsters*, 520 F.2d 951, 973 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976); *Oxford Manufacturing Co. v. Cliff House Building Corp.*, 224 Pa. Sup. 387, 307 A. 2d 343,344 (1973). If, on the other hand, the claim is not mathematically ascertainable, prejudgment interest is ordinarily not allowed. However, the court, in its discretion, may in a particular case find that the equities of the circumstances demand an award of interest and may grant such an award as it deems proper. *Miller v. Robertson*, 266 U.S. 243, 258 (1924); *Cold Metal Process Co. v. United Engineer & Foundry Co.*, 235 F.2d 224, 231 (3d Cir. 1956); *Prudential Insurance Co. v. City of Philadelphia*, No. 73-110 (E.D. Pa. Oct. 24, 1975), *aff'd* No. 76-1559 (3d Cir. Jan. 7, 1977); *Marazzo V. Scranton Nehi Bottling Co., Inc.*, 438 Pa. 72, 74-5, *263 A.2d 336 (1970)*.

In this case, I believe that the equities demand an award of prejudgment interest on the entire amount USL owes Sun. Accordingly, I do not need to reach the issue of whether and when Sun's claim was reduced to a liquidated sum.[4]

[4] There is substantial precedent for the proposition that claims for work done pursuant to a clause providing for postponed cost-determination are liquidated. In Ring Construction Corp. v. United States, 209 F.2d 668, 673 (8th Cir. 1954), the Government sued under the Renegotiation Act, 50 U.S.C.A. Appendix §1191, to recover "excessive profits" paid the defendant under a wartime contract. Like USL in this case, defendant claims that its debt would not be "final" or "liquidated" until the final court determination of the excessive profits. The Eighth Circuit Court of Appeals disagreed, holding:

> 'sums due the U.S. upon renegotiation of contracts are clearly debts ... Interest therefore runs from the date upon which the contractor fails to make repayment, after proper notice.' ... This is true even though the liability is unilaterally determined.

Cf. Swartzbaugh Manufacturing Co. v. United States, 289 F.2d 81, 84 (6th Cir. 1961). Similarly, in Gloeckler v. Imrie, 118 Pa. Super. 441, 445, 179 A. 883 (1935), defendant counterclaimed for

Under the contract, Sun undertook to provide USL with five vessels. As discussed below, the contract contemplated that Sun be compensated as the work progressed. Streamlined arbitration procedures for disputes were provided so that payment could be made promptly. Sun performed its obligations fully and diligently. Even when substantial mid-construction changes were ordered by USL, work proceeded rapidly and delivery of the vessels was delayed by only a short period. Furthermore, although Sun could have submitted estimates of "change-costs" on a monthly basis and could have reasonably expected prompt progress payments to be made (see Contract, Cl. IV(a)[5]), it chose instead to await completion and delivery of the vessels before demanding payment. The record discloses no substantial complaints by the Government or USL about the quality of plaintiff' [sic] products.

In strict contrast to plaintiff's professional attitude toward the contract and in clear violation of the spirit of the agreement, the Government and USL acted to delay compensating plaintiff for its work. Sun submitted its final estimate of costs to the Maritime Administration's Division of Estimates on November 24, 1965. Despite the contract's clear mandate for a prompt decision, the Division failed to rule for nearly two years. The first internal appeal resulted in another delay of nearly two years. The final internal appeal to the Maritime Subsidy Board was not ruled upon until nearly six years had elasped from the date of Sun's submission of costs.

It is significant to note two facts. First, Sun's compensation was to be one hundred ten percent of *costs*, illus-

reasonable compensation for "extra work" performed under the contract. Replying to plaintiff's contentions that such a claim was not liquidated, the Pennsylvania court held that where the claim arises "under a contract claiming a definite amount", interest was due from the date of completion of the contract. *Cf.* Oxford Manufacturing Co. v. Cliff House Building Corp., 224 Pa. Super. 387, 389, 307 A.2d 343 (1973).

[5] Pertinent clauses of the contract are reproduced in the Appendix to this Opinion.

trating that long before it even requested compensation, Sun had spent most of the money it claimed on USL's behalf. Second, although USL had ordered Sun to make those expenditures, it never offered to reimburse Sun pending the outcome of the lengthy arbitration; indeed, as late as 1977, USL still refused to reimburse Sun for a large portion of the amount USL *conceded* it owed, retaining the investment and other financial benefits of the money it withheld. A less stable company than Sun would undoubtedly have been unable to withstand the financial strain imposed upon it by the actions of the Government and USL. In view of these facts, I conclude that the equities in this case weigh heavily in plaintiff's favor, and I have therefore exercised my discretion to award prejudgment interest to Sun.

At least three courts of appeals, including the Third Circuit Court of Appeals, have upheld the discretionary right of a district court to award prejudgment interest under the circumstances presented in this case. In *United States v. Bethlehem Steel Corp.*, 113 F.2d 301 (3d Cir. 1940), *aff'd*, 315 U.S. 289 (1941), a shipbuilder sued to recover compensation from the Government and from a private corporate defendant under a form of "cost-plus" shipbuilding contract. The amount of compensation, by definition, was determined after completion of construction. The Court of Appeals held that the claim was unliquidated. Nevertheless, it found that under Pennsylvania law "the allowance of interest prior to judgment was discretionary with the district court", *id.* at 308, and "should be governed by equitable principles", *id.* at 309.[6]

In *Dunlap v. Warmack-Fitts Steel Co.*, 370 F.2d 876 (8th Cir. 1966), a construction contractor sued for compensation for "extra work" not included in the contract. Without ruling on the defendants' contentions that this claim was unliquidated, the court held that prejudgment interest should be awarded from the time the plaintiff demanded

[6] The district court in Bethlehem Steel, however, denied interest on the ground that the contract was virtually unconscionable, and thus the equities in the case did not lie with the shipbuilder.

payment for the extra work. *See also Gloecker v. Imrie*, 118 Pa. Super. 441, 179 A. 883 (1935).

Finally, in *Swartzbaugh Manufacturing Co. v. United States*, 289 F.2d 81, 85 (6th Cir. 1961), the plaintiff made a contract with the Government under which prepaid compensation was to be "redetermined", based on actual costs, upon completion of plaintiff's work. The Government determined that it had overpaid, and plaintiff undertook a series of appeals from that determination. In response to the Government's demand for interest from the date of the unilateral redetermination, plaintiff asserted that its debt was unliquidated until a final court decision on its appeals. The Sixth Circuit Court of Appeals upheld the district court's discretionary award of interest, stating:

> No equitable principle was offended by the allowance of interest in the case at bar. Plaintiff had the use of, and withheld, the government's money for the period for which it was required to pay interest.

See Ring Construction Corp. v. United States, 209 F.2d 668 (8th Cir. 1954). *Cf. Clarke Baridon, Inc. v. Merritt-Chapman & Scott Corp.*, 311 F.2d 389, 399 (4th Cir. 1962).

In this case, USL has had the use of Sun's money for twelve years. At simple six percent interest,[7] the accrued interest over that period on USL's share of the final award exceeds one million dollars. To hold under the circumstances of this case that Sun is not entitled to an accounting and interest for the sum withheld would be an abuse of my discretion.

B. From When Should Prejudgment Interest Be Awarded?

Having determined that prejudgment interest should be awarded from the time USL's debt was payable and demanded, I must now determine when that time occurred. USL contends that Clauses IV(d)(ii) and 4(e) of the contract

[7] Under Pennsylvania law, six percent is the applicable interest rate in contract-related claims. Miller v. Reading, 369 Pa. 471, 87 A.2d 223 (1952).

require me to find that no change costs are payable until all disputes concerning those costs are finally adjudicated. Alternatively, USL apparently contends that Sun has not yet properly demanded payment or at best demanded payment by its 1972 invoices. I disagree.

The scheme of the contract is designed to prevent undue delay of construction because of negotiations pertaining to change orders. Therfore, the contractor is required to proceed with its work diligently, Cl. 4(e), Article 36. In exchange, the contractor is entitled to receive compensation of one hundred ten percent of the change costs and to receive the bulk of that compensation in the form of progress payments as the necessary work develops. Cl. IV(a)(ii). The entire contract contemplates parallel action by the parties; Sun is to continue to work diligently, while USL and the government are to make prompt payments.[8] The contract protects the Government and USL from excessive payment by permitting them to withhold five percent of the amount due until final delivery and, possibly, for a period thereafter. Cl. IV(a)(ii), Cl. IV(b), Cl. IV(d). Article 14 of the contract clearly shows that it is intended to provide a formula whereby all transactions among the parties are completed within one year of delivery of the final vessel. This contractual scheme would be nullified were I to permit USL to withhold payments without paying interest for twelve years.[9]

[8] Examples of clauses which mandate prompt action by USL and the Government abound. Article IV requires progress payments. Clause XII(b), dealing with contractor initiated changes, requires that "the Owner and the Board shall make every reasonable effort to expedite its analysis of any value engineering proposal." Clause 4(e) states that the Board must "*as soon as practicable*" act on the contractor's estimate and that the decision must be forwarded to the contractor "promptly".

[9] Were I to accept USL's position, I would be holding that the "owner" under the standard Contract at issue in this case would be entitled to enter an objection to payment, pursue dilatory appeals through the entire administrative and judicial process, and in the interim retain the amounts due, interest free. To

When, then, was compensation "payable" and "demanded"? As I interpret the contract, Sun would have been entitled under Cl. IV(a) to submit monthly demands for progress payments relating to change costs. The Board and USL, for their part, would have been required to act promptly on those demands. In the event of a dispute, the parties were required to submit to the arbitration of the Office of Ship Construcition, Article 36, and the arbitrator was to decide reasonably promptly. In view of the Article 14 expectation that transactions be completed within one year, the contract evidently presumed that a prompt decision meant no longer than that period.

Sun chose not to follow those procedures until November 24, 1965, two months after work on the vessels had been completed. Therfore, until that time Sun made no demand for payment. Sun's submission of its final estimate on November 24, however, put USL on notice of the amount Sun claimed. USL received a copy of the estimate. Had USL offered payment at that time, Sun would certainly have given it a full release and all transactions between the parties would have ceased. Thus, although Sun did not mail USL a formal invoice because it was abiding by Maritime Administration procedures, I find that its submission of the estimate constituted a demand for payment on USL.

I now consider when the demand became "payable".[10] As noted above, the contract contemplates submission of the dispute to the Office of Ship Construction and also contemplates final decision by that Office within a reasonable time, not to exceed one year. That decision would

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illustrate that such a hypothesis is not far-flung speculation, I note that, with the exception of Sun's appeal to the Court of Claims (regarding the government's debt), USL entered a cross-appeal to each of Sun's appeals.

[10] Defendant contends at p. 15 of its Memorandum in Support of its summary judgment motion that I am bound, in deciding when Sun's demand became payable, by a Court of Claims decision which allegedly held that USL's debt was not "finally determined" by the final administrative decision of the Maritime

serve to render the demand "payable" for the first time, even though the decision was subject to appeal. *Cf. Weldon & Kelley Co. v. Pavia Co.*, 354 Pa. 75, 46 A.2d 466 (1946); *Lackawanna Iron & Steel Co. v. Lackawanna Wyoming R.R.*, 299 Pa. 503, 149 A. 702 (1930). In this case, the decision was not entered until three years and nine months later. This delay, not the "fault" of the plaintiff, was excessive under the contract.

Since the contract contemplated a shorter period, I find that plaintiff's demand should be deemed to have become payable within a reasonable time of Sun's submission of the estimate. In this case, one year would have been the maximum "reasonable" time for the initial administrative decision. Accordingly, interest should be awarded from November 24, 1966.[11]

Subsidy Board. Without reaching the merits of the res judicata argument, I find that the issue considered by the Court of Claims has no relevance to these proceedings. The Court of Claims was considering only the issue of whether the decision was final such that USL had defaulted by refusing to make payments pending further appeals. Even if the court by its dismissal of Count I of Sun's complaint did hold that USL had not defaulted, that decision in no way determines that USL should not be liable for interest on the debt it in fact owed.

[11] In determining that the "arbitrator's" delay was unreasonable and that plaintiff should not be penalized for it, I note that here there was no totally "impartial" arbitrator. The arbitrating office was a division of the very governmental agency responsible for paying the Government's share of Sun's estimate. Since Sun can collect no interest on the Government's share, 29 U.S.C. §2516(a), the arbitrator certainly had no interest in rendering a speedy decision.

I emphasize that interpreting the contract as I have imposes no undue hardship on USL. Throughout this period, USL had the use of the money owed to Sun and was able to receive interest on it. To hold now that USL must turn over a reasonable amount of interest for the period during which it possessed the money is not inequitable.

V. USL'S AFFIRMATIVE DEFENSES TO THE INTEREST AWARD

Defendant raises a number of affirmative defenses to Sun's interest claim. All of these defenses are without merit.

USL contends that Sun raised the interest question in its action in the Court of Claims and that the court decided against such an award by permitting Sun to dismiss the counts demanding interest against USL. USL argues that this decision bars an award of interest at this time. USL further contends that the Maritime Subsidy Board's finding—that until a final Board decision on Sun's estimate was rendered, Sun's claim was unliquidated and therfore could bear no interest—should also operate to bar our award under the principles of res judicata.

With respect to the Court of Claims decision, it is significant to realize that the court had no jurisdiction to rule upon Sun's claims against USL and had no jurisdiction to award interest against the United States. 28 U.S.C. §2516(a). USL was joined as a party in that action only so that it might protect its own interest while aiding the court in ruling upon Sun's claims against the Government. *Cf. National Cored Forgings Co. v. United States*, 115 F. Supp. 469, 473 (Ct. Cl. 1953). As noted above, Count I of Sun's complaint in the Court of Claims had no relevance to the issue of Sun's right to interest against USL; it dealt only with the issue of whether USL had *defaulted* to the extent that the Government would be required to satisfy USL's obligations. In Count II, Sun sought an increase in the award against the United States. Since the Court of Claims was without jurisdiction to award Sun interest against the United States, it did not with regard to this count decide, nor did it ever hear argument on, the interest issue vis-a-vis USL. While under some circumstances, proceedings in the Court of Claims may have a res judicata effect in subsequent district court proceedings, *see Petrovich v. United States*, 421 F.2d 1364 (Ct. Cl. 1970), *Bowse Inc. v. United States*, 420 F.2d 1057 (Ct. Cl. 1970), and *Miller v.*

United States, at 7-13, No. 76-1082 (E.D. Pa. Oct. 11, 1977), the court in this case cannot have intended to rule on the issue and to bar our decision here. *See Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 844 (3d Cir. 1974) (identical issue must have been decided); *Brown v. United States*, 508 F.2d 618, 621 (3d Cir. 1974), *cert. denied*, 422 U.S. 1027 (1975) (issue must have been actually decided); *Lynne Carol Fashions, Inc. v. Cranston Print Works*, 453 F.2d 1177, 1183 (3d Cir. 1972) (issue must be necessary to first litigation).[12]

Nor does the Maritime Board's decision that Sun's claim was unliquidated bar our award. The facts regarding the payment procedures that were employed are not disputed. The Board's decision that the claim was unliquidated was a decision of law, not of fact. Furthermore, its determination that a finding of nonliquidation required it to deny interest constituted a second decision of law. *Cf. Oxford Manufacturing Co. v. Cliff House, Building Co., supra*, at 390. My review of these decisions and subsequent determination that Sun should be awarded interest regardless of whether its claim was liquidated or not merely overrules the board on a legal matter with respect to which I may reach my own conclusions. *Sea-Land Service, Inc. v. United States*, 493 F.2d 1357, 1361 (Ct. Cl.), *cert. denied*, 419 U.S. 840 (1975); *Moore-McCormack Lines, Inc. v. United States*, 413 F.2d 568 (Ct. Cl. 1969).

USL next contends that its tender of payment in 1972 should preclude any award of interest at least from that date. Under Pennsylvania law, a *sufficient* tender may stop the running of interest. *Appeal of Vandergrift*, 80 Pa. 116, 118 (1875); *Beth-June, Inc. v. Wil-Avon Merchandise Mart, Inc.*, 211 Pa. Super. 5, 11, 233 A.2d 620 (1967); 12 P.S.

[12] USL also contends at p. 20 of its Memorandum in Support of its motion for summary judgment that to the extent Sun failed to press its prejudgment interest claim in the Court of Claims, Sun waived the claim. Since the Court of Claims had no authority to award interest against USL, it would have been futile for Sun to pursue the matter there. Its failure to do so cannot be construed to be a waiver.

§1072. The tender must, however, include interest and must be paid into court if refused. *Englehart v. Cassatt*, 305 Pa. 117, 120-1, 157 A. 256 (1932); 12 P.S. §1073. Most important, the tender must be unqualified. *See Coleman v. Quaker State Coca-Cola Bottling Co.*, 331 F.Supp. 785,787 (E.D. Pa. 1971). Here, USL's tender satisfied none of these requirements; it neither included interest, nor was paid into court, nor was unqualified in view of the fact that it required Sun to abandon its contentions that additional payments were owing. Under these circumstances, Sun's tender cannot be deemed "sufficient" to stop the running of interest on its debt.

Finally, USL claims that Sun's action should be dismissed pursuant to Fed. R. Civ. P. 19 for failure to join the United States as an (indispensable) party. This contention borders on the frivolous. The United States has no interest in these proceedings. Following the Court of Claims decision, the United States satisfied its entire obligation to Sun; Sun and the Government have no further quarrel. Joinder of the Government is not necessary to preserve USL's interest vis-a-vis Sun's claims. USL is able to raise in these proceedings any legal defense it deems appropriate. Should USL succeed in any of its legal contentions, its debt to Sun can be appropriately reduced. To the extent that a dispute between USL and the Government exists, the Government is, apparently, satisfied to settle that dispute in a separate action brought by USL in the District of Columbia. That suit, however, has no bearing on the issues before the court here.

VI. DELAY COSTS

Quite apart from the question of interest, USL alleges that the Secretary's final award to Sun was excessive as a matter of law in three regards: first, that Sun is not entitled to recover "delay costs" resulting from USL's change orders; second, that even if Sun may recover some "delay costs" it may not recover those corresponding to delay prior to the final delivery date under the contract; and third, that Sun's final claim unreasonably exceeds

Sun's initial estimate of costs and the award must therefore be reduced.

A. Delay Costs Generally

The first allegation presents the court with an extremely difficult task of contractual interpretation. In *United States v. Rice*, 317 U.S. 61 (1942), the Supreme Court interpreted a government contract with the following clause relating to change costs:

> If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made . . . .

The Court held that this language provided alternative but mutually exclusive remedies for the plaintiff subcontractor's damage due to a government-initiated delay in performance; that is, the subcontractor's own time for performance could be extended *or* delay costs could be recovered, but not both. USL argues that the contract language in *Rice* is so similar to Articles IV and 4 of the Sun contract as to require a similar interpretation.

The parties correctly have presented this issue of contractual interpretation to me as a question of law. However, in view of the Maritime Administration's experience with the standard contract at issue here, I will give great weight to its decision rejecting USL's contention.[13] *See United States v. American Trucking Assoc., Inc.*, 310 U.S. 534, 549 (1940); *Sea-Land Service, Inc. v. United States*, *supra*, at 1361.

[13] The Rice case in recent years has not met with favorable reaction by the Court of Claims, and there is serious doubt whether it would be upheld in full by the Supreme Court today. *See, e.g.* Paul Hardeman Inc. v. United States, 406 F.2d 1357, 1362 (Ct. Cl., 1969) Law v. United States, 195 Ct. Cl. 370, 432 (1971). *See also* Shedd, The Rice Doctrine and the Ripple Effects of Changes, 32 Geo. Wash. L. Rev. 62 (1963); Note, The Rice Doctrine After Twenty five Years: Bloody but unbowed, 39 Colo. L. Rev. 533 (1967). In view of that fact and the Maritime Administration's belief that Rice should not apply, I am constrained to read the case narrowly under the circumstances before me.

I am persuaded that the Maritime Board's interpretation of the contract is correct and that Sun is entitled to be compensated for all costs resulting directly from USL's change orders. Clauses 4(d) and 4(e) specifically provide for recovery costs due to delay. Unlike the terms in the *Rice* contract, a separate provision deals with time extensions, *see* Article 5, clearly suggesting that the remedies are not mutually exclusive. The Maritime Subsidy Board correctly determined that Clause 4(d)'s provision for compensation for increases "in the cost of the contract work" should be interpreted to encompass all costs, including those associated with delay.[14]

In facts of *Rice* as well as the contractual language therein are distinguishable from those in the case at bar. In *Rice*, the subcontractor was prevented from *commencing* work at the appointed time because the Government's change order delayed completion of the general contractor's work. Since it had not yet begun, and since no additional work was ultimately required of the subcontractor, the Court specifically held that it was equitable to permit an extension to complete work as the exclusive remedy. *Cf. United States v. Foley Co.*, 329 U.S. 64 (1946), explaining *Rice* and *H.E. Crook v. United States*, 270 U.S. 4 (1926). In our case, Sun had already begun work and USL ordered it to change the plans in mid-stream. Sun's delay costs accrued directly from the change orders, and could

[14] The United States, both in the administrative proceedings and in the Court of Claims, conceded this to be the proper interpretation of the contract. As Sun points out at length in its Memorandum in Support of its motion, at 22, this interpretation is further supported by the policy announced by the Federal Maritime Board in the early 1960's to reimburse contractors for change costs by paying for the changes at the price the contractor would initially have bid had he known of it. Sun Shipbuilding & Dry Dock Co. v. United States 393 F.2d 806, 810 (1968). These payments would necessarily have included delay costs. Although this policy was no longer in effect at the time the Sun contract was signed, it should have put USL on notice that express language in the contract was necessary if the Rice doctrine was intended to apply to it.

not have been avoided by any foresight on Sun's part. Under these circumstances, unlike in *Rice*, it would be inequitable to deny Sun recovery for them.[15]

B. Pre-Deadline Delay Costs

The parties do not seriously contest that, absent USL's change orders, Sun would have delivered the vessels fifteen days prior to the deadline and that because of those orders it was unable to do so. Furthermore, for purposes of these motions, it is uncontested that Sun suffered costs associated with that delay. Since I have determined that the contract entitles Sun to recover delay costs generally the issue of whether Sun is entitled to recover pre-deadline delay costs is easily settled.

The only substantive defense which USL has raised is that *United States v. Blair*, 321 U.S. 730 (1940), precludes such a recovery. In *Blair*, the Government contracted with two contractors. The general contractor, Blair, was given four hundred twenty days to complete construction of a building but planned to complete construction within three hundred fourteen days. The other contractor, however, delayed its work and consequently forced Blair to use the entire four hundred twenty days. Blair attempted to hold the Government liable for his delay costs because it failed to terminate the second contractor's contract promptly and to hire a third contractor so as to enable Blair to proceed. The Court denied liability, holding:

> [N]othing in the government construction contract used in this case imposed an obligation or duty on the

[15] This distinciton, furthermore, supports Sun's position on how the contract should be interpreted. It would be unlikely that any contractor would knowingly subject itself to the risk of personal liability for delay costs due to changes ordered unilaterally by the other party to the contract or that the government would sanction such an unconscionable requirement in its standard contract form. Thus, it is reasonable to assume that Article 4 of the contract was designed to avoid that result. As noted in the Maritime Board's Final Decision, Sun Exhibit F, at 27, this interpretation of the standard contract has been consistently applied.

> government to aid respondent in completing his contract prior to the stipulated completion date and [that] it was error for the court to award damages to respondent based upon a breach of this non-existent obligation.

321 U.S. at 733.

Blair is inapposite to this case. In *Blair*, the delay was caused by a third party on whom Blair knew he was dependent at the time he signed the contract. Absent a contract clause imposing liability upon the government for such delay, it was proper for the Court to find that Blair had assumed the risk. In this case, Sun's damages were caused directly by USL's actions taken with Government approval. USL exercised its option to order changes and, unlike in *Blair*, the contract required it to bear their cost. Costs due to delay are no less damaging merely because they occur fortuitously before a contract deadline rather than after. Since the contract explicitly provides that such costs are recoverable, USL cannot avoid liability for them. *Cf. Metropolitan Paving Co. v. United States*, 325 F.2d 241 (1963).

C. The Estimate

USL contends that because the Secretary's final award to Sun exceeded Sun's preliminary estimate by 81.6 percent, it is unreasonable and excessive as a matter of law. USL cites no case in which a court has overturned such an award as excessive as a matter of law absent some form of deception, fraud, or negligence. No wrongdoing is evident in this case. Indeed, the hearing examiner found that Sun proposed a fixed price for the changes, thus accepting the risk of an error in estimating costs, but that USL rejected that proposal. USL Exhibit 3. *Cf. Everett Plywood and Door Co. v. United States*, 419 F.2d 425, 433 (Ct. Cl. 1969). While I do not hold such an award can never be excessive as a matter of law, I see no reason to disturb the Secretary's finding in this case that $3,070,547.95 is reasonable. *Cf. Brawley v. United States*, 96 U.S. 168 (1877).

VII. CONCLUSION

I have found that Sun is entitled to prejudgment interest from November 24, 1966. In view of that decision, I do not reach the issues of whether interest should be awarded, on different grounds, from the date of the Maritime Subsidy Board's final order or whether interest should be awarded only on the amount USL at all times conceded was due.

Edward N. Cahn, J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 75-2275

SUN SHIPBUILDING AND DRY DOCK COMPANY

v.

UNITED STATES LINES, IINC.

ORDER

AND NOW this 31 day of October, 1977, upon consideration of plaintiff's Motion for Summary Judgment and defendant's Motion for Summary Judgment, IT IS ORDERED that plaintiff's Motion is GRANTED and defendant's Motion is DENIED.

The parties are directed to submit to the court proposed orders entering final judgment for plaintiff.

By The Court:
Edward N. Cahn, J.

Dated: 11/2/77

APPENDIX A

I. PERTINENT "GENERAL PROVISIONS" OF THE CONTRACT.

Article 4 (b) The Owner, with the approval or authorization of the Board, may direct any change in the Plans and Specifications effecting a deduction from or an addition to the contract work set out therein within the general scope thereof; provided, however, if a directed change in

the Plans and Specifications affects a specific guarantee set out in the Specifications or in the Special Provisions and such effect is noted by the Contractor in its estimate of the change the guarantee will be modified to the extent determined by the Board. The Contractor shall proceed promptly with all changes authorized or directed by the Owner, and approved or authorized by the Board, as provided in this Article 4; provided, however, if the Board determines that the performance of the increased work incident to a major change will subject the Contractor to damages from the consequent delay of other work of the Contractor then under contract, the Contractor shall not be required to proceed with such additional work unless the Owner agrees to pay to the Contractor such damage costs as determined and approved by the Board.

(c) In connection with the consideration of a proposed change in the Plans and Specifications initiated by the Owner, the Owner may request (if the proposed change makes a major change in the Plans and Specifications such request shall be approved by the Board) the Contractor to submit to the Owner the Contractor's preliminary estimate of the change in cost, weight, moments and centers and delay in delivery of the vessel which estimate shall be accompanied by a full description of the completed work which would be eliminated or would have to be modified, or acquired material which would not be used if the change is approved and of the effect, if any, of the proposed change on any guarantee of the Contractor under this contract and if the change is a major change the damage cost referred to in 4(b) above. Said preliminary estimate shall be submitted to the Owner within the time determined by the Board to be reasonably required for the preparation of such estimate. The Owner and the Board shall consider such preliminary estimate. Within a reasonable time the Contractor shall be directed to proceed by the Owner, as approved by the Board, or shall be advised by the Owner that the proposed change will not be directed. In the event the proposed change is not directed, and the Board determines that the change proposed was a major change in the contract work, the Contractor shall be reimbursed for the

engineering and estimating costs involved, as determined by the Board.

(d) Promptly and within a reasonable time, as determined by the Board, after receipt of directions from the Owner, as approved or authorized by the Board, to make a change in the Plans and Specifications, or authorization by, the Owner as approved or authorized by the Board of a change in the Plans and Specifications, requested by the Contractor, the Contractor shall furnish to the Owner, in writing, a statement of its detailed estimate of the net increase or decrease in the cost of the contract work and probable delay in delivery of the vessel to result from such change.

(e) The Owner shall transmit such statement to the Board which shall consider the Contractor's statement and on the basis thereof and on the basis of such other evidence as the Board may deem relevant shall, as soon as practicable, approve or disapprove the Contractor's estimate. The Owner shall promptly notify the Contractor of the board's approval or disapproval of the Contractor's estimate. Notwithstanding a dispute in connection with the Contractor's estimate of the cost of a change, the Contractor shall, nevertheless, proceed promptly with the work covered by such directed or approved change. One hundred and ten per cent (110%) of the net increase in estimated cost, if any, resulting from all change cost estimates, as approved or as finally determined, shall be added to the contract price as an adjustment thereof. In the event of a net decrease in contract cost in the total of all such cost estimates the Contract Price shall be reduced by the amount of such net decrease.

Article 5. EXTENSION OF TIME.—(a) In case of any delay caused by the Owner, by the Board, or by any other agency or instrumentality of the United States, or by any one or more of them, or in the case of the occurrence of any cause of delay reasonably beyond the control of the Contractor, . . . written notice thereof and of the anticipated effect thereof, when knowledge thereof has come to the

Contractor, shall be given promptly by the Contractor to the Owner. Within twenty (20) days (or such longer period as the Owner may allow) after such cause of delay has ceased to exist, the Contractor shall furnish to the Owner a statement of the actual delay resulting from such cause. The Owner shall submit the Contractor's statement to the Board together with any information and comments it deems relevant for the Board's use in determining whether such delays were caused by any cause set out in this Article 5(a).

(b) On the basis of the statements and information furnished to the Owner by the Contractor, which the Owner shall transmit to the Board, in regard to change in delivery as provided in paragraph (a) of Article 4 of these General Provisions and as provided in paragraph (a) of this Article 5, and on the basis of such other evidence as the Board shall deem relevant, the Board shall determine the number of days that the date provided in the Special Provisions for the contract delivery date of the vessel shall be advanced or extended by reason of a change in Plans and Specifications or caused by a cause set out in paragraph (a) of this Article 5, excepting, however, any delay resulting from a cause of delay in effect as of the date of the opening of bids under which this contract was awarded; provided, however, that no extension of contract delivery date shall be granted on account of the delay of subcontractors (including material suppliers) unless such delay was due to causes beyond the control of the subcontractor including the specific causes enumerated in paragraph (a) of this Article 5, excepting any delay resulting from the continuation of a cause of delay in effect as of the date of the subcontract award, where the Board determines that the Contractor had notice of the subcontractor's cause of delay prior to or at the time of subcontractor's award (other than a cause of delay which the Board determines to be industry-wide).

(c) The determinaton of any and all extensions of time for delivery of the vessel provided for in paragraph (b) of this Article 5 shall be postponed, without prejudice to the

rights of the Contractor or the Owner, until the vessel has been delivered, provided, however, the Board on its own initiative or upon request of either the Contractor or the Owner may grant an extenion of contract delivery date proir to delivery of a vessel.

Article 6. LIQUIDATED DAMAGES FOR DELAY IN DELIVERY. In the event the Contractor fails to deliver the vessel on or before the contract delivery date provided in the Special Provisions, as said contract delivery date may be extended pursuant to Article 5 of these General Provisions, the Owner and the Board will suffer damages which are difficult of ascertainment, so that it is agreed by the Contractor and the Owner and the Board that the sum set out in the Special Provisions as the per-day liquidated damages represents the damages to the Owner and the Board for each day of delayed delivery, and the Contractor shall pay to the Owner and the Board in discharge of its obligation to the Owner and the Board for its failure to deliver the vessel on the contract delivery date as such date has been extended pursuant to the provisions of this contract, as liquidated damages and not as a penalty, the said sum as per-day liquidated damages, for each calendar day or part thereof elapsing from the contract delivery date until the delivery date of the vessel. The payment of such liquidated damages shall not affect any other rights or remedies of the Owner or the Board hereunder as to matters other than the date of delivery. Such liquidated damages shall not be considered as an allowable item of cost in the determination of profit under the provisions of Article 15 of these General Provisions.

Article 14. GUARANTEE PERIOD—LIABILITY FOR DEFECTIVE WORK OR MATERIAL. - (a) Nothwithstanding any inspection or failure to reject by the Owner or any regulatory body pursuant to Article 9 of these General Provisions, it at any time within six (6) months after the delivery of the vessel any weakness, deficiency, failure, breaking down or deterioration in workmanship or material furnished by the Contractor in performing the contract work (herein called "defective workmanship" or "defective

material") shall appear or be discovered, such defective workmanship or defective material shall be made good, at the Contractor's expense, to the requirements of the Plans and Specifications and of this contract; . . . In computing the guarantee period from the date of the Owner's acceptance of the completed vessel there shall be excluded any time the vessel is prevented from entering or is taken out of service on account of any defective workmanship or defective material for which the Contractor is responsible, as herein provided.

(b) The Owner shall notify the Contractor of any defective workmanship or defective material or damage for which the Contractor is liable pursuant to paragraph (a) above, discovered or appearing within the guarantee period within twenty (20) days of the end of such period or if the vessel is at sea at the end of such period within twenty (20) days of the end of the voyage. . . .

(c) A final guarantee survey of the vessel shall be conducted by the Maritime Administration's Guarantee Survey Board at the expiration of the guarantee period, or as soon thereafter as the Owner shall deem practicable, but not later than six (6) months after the expiration of such guarantee period. Such survey shall be based on the defective workmanship and defective material in the contract work appearing or discovered during the guarantee period. In the event that the vessel is not available for the guarantee survey on or before the end of the guarantee period, the Owner promptly shall submit a list of all the defective workmanship and defective material in the contract work appearing or discovered during the guarantee period, to the Board with a copy to the Contractor. Such survey shall be held at such port in the United States as the Owner designates and seven (7) days' written notice of time and place for such final guarantee survey shall be given to the Contractor by the Owner.

Article 36. DISPUTES. - Any action, ommission, direction, decision or determination of the Board, the Owner or the Contractor under this contract may be subject of a

dispute. Any dispute arising under this contract which is not disposed of by agreement of the parties to this contract, shall be decided by the Chief, Office of Ship Construction, of the Maritime Administration, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor and to the Owner, which decision shall be final and conclusive and shall bind all parties to this contract unless within thirty (30) days from the date of receipt of such copy the Contractor or the Owner appeals from said decision by mailing or otherwise furnishing said Chief, Office of Ship Construction, a written appeal addressed to the Board. The decision of the Board on any question of fact, unless determined by a court of competent jurisdiction to have been fraudulent, capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence, shall be final and conclusive and shall bind all parties to this contract. In connection with any appeal proceeding under this Article 36, the Contractor and the Owner shall be afforded an opportunity to be heard before the Board or before the duly authorized representative or representatives of the Board appointed for the hearing of said appeal and an opportunity to offer evidence in support of or in opposition to the appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract work and in accordance with the decision of said Chief, Ofice of Ship Construction. The fact that the Owner, with or without comment, refers to the Board as hereinbefore provided, the Contractor's estimates as to the cost and time of making changes, shall not prejudice the rights of any party to have any dispute relating thereto decided under the Article 36.

II. PERTINENT "SPECIAL PROVISIONS" OF THE CONTRACT.

Article IV. PAYMENT OF CONTRACT PRICE. (a) Progress payments on account of the Contract Price, adjusted as herein provided, shall be made to the Contractor by the Owner and the Board as the contract work progresses. The

amounts of such payments shall be determined substantially in accordance with the usual Board practice of dividing the Contractor Price into points representing the estimated cost of labor and material of the various components of the Contract Price and measuring such progress by the per cent of completion of said portions of the Contract Price as attested by representatives of the Board, the Owner and the Contractor. Such progress payments shall be made at monthly intervals, or at such other intervals as the parties agree, as follows:

(i) The Board shall pay the Contractor forty eight and six tenths percent (48.6%) and the Owner shall pay the Contractor fifty one and four tenths per cent (51.4%) of that portion of each progress payment on account of the Contract Price set out in Article I(a) hereof (excluding, however, the sum of Ninety Thousand Five Hundred Dollars ($90,500.) of the Contract Price for the National Defense features incorporated in the vessels).

(ii) The Board shall pay the Contractor forty eight and six tenths per cent (48.6%) and the Owner shall pay the contractor fifty one and four tenths per cent (51.4%) of that portion of each progress payment on account of the net increase in Contract Price, pursuant to Article 4 of the General Provisions, for changes in the contract work approved by the Board as eligible for construction-differential subsidy; provided, however, in the event there is a net decrease in the Contract Price on account of such changes, the amounts otherwise payable by the Owner and the Board pursuant to this Article IV shall be reduced by the respective percentage of such net decrease.

(iii) The Board shall pay the Contractor one hundred per cent (100%) of that portion of each progress payment on account of Ninety Thousand Five Hundred Dollars ($90,500.) of the Contract Price set out in Article I(a) hereof for the National Defense features incorporated in the Vessels.

(iv) The Board shall pay the Contractor one hundred per cent (100%) of that portion of each progress payment

on account of the net increase in the Contract Price, pursuant to Article 4 of the General Provisions, for changes in the Plans and Specifications of the National Defense features; provided, however, in the event there is a net decrease in the Contract price on account of such changes, the amounts otherwise payable by the Board pursuant to this Article IV shall be reduced by the amount of said net decrease.

(v) The Owner shall pay the Contractor one hundred per cent (100%) of that portion of each progress payment covering increases in the Contract Price pursuant to Article 4 of the General Provisions hereof on account of changes of the Owner approved by the Board but not approved as eligible for construction-differential subsidy provided, however, in the event there is a decrease in the Contract price on account of such changes, the amounts otherwise payable by the Owner shall be reduced by the amount of such decrease.

(b) The aggregate of the progress payments provided in (a) above shall not be in excess of:

(i) Ninety-five percent (95%) of the value (as represented by the Contract Price set out in Article I(a) hereof) of the work performed and materials delivered to the Shipyard for the construction of the Vessels (subject, however, to the provisions of paragrah (c) of this Article); plus

(ii) Ninety-five per cent (95%) of any cumulative net increase in Contract Price pursuant to Article 4 of the General Provisions, as of the date of said partial payment; or minus

(iii) Ninety-five percent (95%) of any cumulative net decrease in Contract Price determined pursuant to Article 4 of the General Provisions, as of the date of said partial payment.

(d) The amounts withheld under the provisions of paragraph (b) of this Article (IV) plus any other amounts payable to the Contractor under the terms of the Contract shall be paid as follows:

(i) One-half of the amount as withheld as to each Vessel, except the last Vessel, shall be payable promptly after the delivery of such Vessel.

(ii) The remaining one-half of the amount withheld as to each Vessel, except the last Vessel, shall be paid promptly upon completion of the final guarantee survey of such Vessel held pursuant to Article 14(c) of the General Provisions of the Contract, less, however, any amount required by the Board to be withheld as additional security to protect the Owner and the Board with respect to all remaining contractual obligations of the Contractor, including the cost of remedying any remaining delivery or guarantee deficiencies and any disbursements by the Owner pursuant to Article 14 of the General Provisions, and neither the Contractor nor anyone claiming through the Contractor shall have any claim against such withheld amounts unless and until such obligations and guarantee deficiencies are remedied. The Owner and the Board may apply such withheld amounts towards the payment of or reimbursement for the expense of fulfilling such contractual obligations and remedying such deficiencies and the Contract Price and progress payments shall be adjusted and satisfied accordingly. Any amounts remaining of such deductions after remedying such deficiencies shall, however, be thereafter payable progressively promptly as such obligations and deficiencies are settled, except with respect to the last Vessel.

(iii) All other amounts payable to the Contractor pursuant to this Contract shall be paid by the Owner and the Board within thirty (30) days after (a) the Owner has notified the Board that all delivery and guarantee obligations have been satisfied, and (b) the Board has determined that all disputes and all claims under the Contract have been settled or finally adjudicated, and has also determined the final contract price.

(e) No payment shall be made except on bills, vouchers, or invoices submitted in such number or form and executed and attested in such manner as shall be prescribed by the Owner with the approval of the Board.

Article XII

(b) The Owner and the Board shall make every reasonable effort to expedite its analysis of any value engineering proposal submitted by the Contractor within the times set out in the Specifications, provided, however, the Owner and the Board shall have no liability to the Contractor under this Contract or otherwise for any delay in taking action upon a value engineering proposal submitted by the Contractor or for any failure to take action upon any such study or recommendation.

Article XIV. MODIFICATION TO GENERAL PROVISIONS. The General Provisions referred to in Article I hereof are modified as follows:

(a) Add the following at the end of Article 14(b):

"Within 30 days after such determination has been communicated to the Contractor, the Contractor, if it disputes the determination, shall submit the determination to the Chief, Office of Ship Construction, of the Maritime Administration, as a dispute for decision by such Chief, Office of Ship Construction, with the right of appeal to the Board, all as provided in Article 36 hereof."

ORDER DENYING RECONSIDERATION
November 22, 1977

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 75-2273

SUN SHIPBUILDING & DRY DOCK CO.

v.

UNITED STATES LINES, INC.

ORDER

AND NOW this 22nd day of November, 1977, upon consideration of defendant's Motion for Reconsideration, IT IS ORDERED that the motion is DENIED.

This court's Order was entered on November 1, 1977. Defendant's notice of intention to file its motion was served on November 15, 1977. Defendant's motion is therefore barred by Fed. R. Civ. P. 58, which requires motions to alter or amend judgments to be filed within ten days after entry of the judgment.

Even if defendant's motion is not barred, the contention contained therein is without merit. This court's Order of February 16, 1977, held only that the statute of limitations did not bar plaintiff's cause of action because plaintiff was not capable of commencing suit in the federal courts until arbitration procedures were completed. That decision in no way precluded my subsequent finding that defendant's debt was due and payable prior to the completion of administrative arbitration. For is it inconsistent

with my ruling that the equities of this case demand payment of interest on defendant's debt for the period during which the administrative award was being determined.

By The Court:

EDWARD N. CAHN, J.
Edward N. Cahn, J.

Dated: 11/23/77

FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 75-2275

SUN SHIPBUILDING & DRY DOCK CO.

v.

UNITED STATES LINES, IINC.

JUDGMENT

AND NOW, this 30th day of November, 1977, final judgment, within the meaning of Rules 54(a) and 58 of the Federal Rules of Civil Procedure, is entered in favor of the Plaintiff and against the Defendant in the total amount of $1,067,874.14 consisting of the balance found to be due under the Maritime Administration's Contract No. MA/MSB-11 in the amount of $466,511.14 with prejudgment interest computed from November 24, 1966 at the legal rate in the amount of $601,363.00 in accordance with this Court's Memorandum and Order filed November 1, 1977.

EDWARD N. CAHN, J.
Edward N. Cahn, J.

Date: 11/30/77

ORDER, COURT OF APPEALS, THIRD CIRCUIT
September 5, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1025

SUN SHIPBUILDING AND DRYDOCK COMPANY

vs.

UNITED STATES LINES, INC., *Appellant*

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 75-2275)

Argued September 5, 1978
Before: ALDISERT AND HIGGINBOTHAM, *Circuit Judges*, and MEANOR, *District Judge*.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by the Honorable Edward N. Cahn, 439 F.Supp. 671 (E.D. Pa. 1977), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By The Court:

R.J. ALDISERT
R.J. Aldisert
Circuit Judge

Dated: September 5, 1978

* Honorable H. Curtis Meanor, of the United States District Court for the District of New Jersey, sitting by designation.

ORDER, COURT OF APPEALS, THIRD CIRCUIT
October 5, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1025

SUN SHIPBUILDING AND DRYDOCK COMPANY

vs.

UNITED STATES LINES, INC., *Appellant*.

SUN PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, and HIGGINBOTHAN, *Circuit Judges*, and MEANOR, *District Judge*.*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in Dane, the petition for rehearing is denied.

By the Court,

ALDISERT
Aldisrt
Judge

Dated: October 3, 1978

* Honorable R. Curtis Meanor, of the United States District Court for the District of New Jersey, sitting by designation.

ORDER, COURT OF APPEALS, THIRD CIRCUIT
October 16, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1025

SUN SHIPBUILDING AND DRYDOCK COMPANY

vs.

UNITED STATES LINES, INC., *Appellant*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until November 9. 1978.

ALDISERT
Aldisert
Circuit Judge

Dated: October 16, 1978

ORDER AND MEMORANDUM, JUDGE SIRICA
September 21, 1977

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-2347

UNITED STATES LINES, INC.,
Plaintiff,

v.

JUANITA KREPS, et al.,
Defendants.

ORDER

(Filed September 21, 1977)

Consistent with the memorandum issued of even date herewith, it is this 21st day of September, 1977

ORDERED that defendants' motion to dismiss plaintiff's complaint be, and the same hereby is, denied; and it is

FURTHER ORDERED that counsel for plaintiff shall within thirty (30) days from the date of this order move the Court to transfer this action, if a transfer is desired, to the District Court for the Eastern District of Pennsylvania.

JOHN J. SIRICA
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-2347

UNITED STATES LINES, INC.,
Plaintiff,

v.

JUANITA KREPS, et al.,
Defendants.

MEMORANDUM
(Filed September 21, 1977)

This case arises out of a tripartite agreement for the construction of five ships executed on October 10, 1962 by plaintiff United States Lines, Inc. (USL), the United States acting through defendant Maritime Subsidy Board (the Board) of the Department of Commerce and Sun Shipbuilding and Drydock Company (Sun). Sun is not a named party in this action. The agreement basically obligated Sun to build the vessels, USL to take title to them in exchange for paying 51.4% of their cost and the United States through the Board to subsidize the balance of 48.6%. The contract set the price for each vessel at $10,590,000 for a total price of $52,950,000. From this figure the amounts owed by the United States and USL was to be calculated, unless the contract price was adjusted as a result of an approved change in the specifica-

tions, in which case the amount owing was to be determined on the basis of the adjusted contract price.

During the course of construction, USL and the Board acted to initiate changes in the contract work to be performed on the engine plant and crew quarters of each vessel. This action required Sun to furnish preliminary estimates of the cost increase occasioned by these modifications. Sun submitted estimates of $338,000 per vessel, totaling $1,690,000 for the five ships. Given these preliminary figures, USL and the government then approved the change orders, thereby authorizing Sun to proceed with construction of the vessels as modified.

Beginning in late 1964 and continuing into 1965, Sun completed construction of the ships and delivered them to USL although somewhat behind schedule. Sun next presented detailed estimates for the construction costs attributable to the modifications made on the vessels. But this figure, $5,740,368, later revised upward to $6,688,895, represented a sharp increase over the earlier estimate of $1,699,000, triggering a dispute among the parties as to the amount actually due and owing to Sun.

Pursuant to procedures specified in the contract, this dispute was presented to various authorities within the Department of Commerce. The net result was a decision rendered by the Secretary on January 1, 1972, awarding Sun a cost increase in the amount of $3,070,547.95. This administrative award satisfied neither Sun, who claimed it was entitled to more, nor USL, who claimed that the Secretary's decision was excessive due to the application of erroneous legal principles.

Sun acted first to obtain what it felt was due. It filed a petition against the United States in the Court of Claims, seeking to increase the administrative award by $1,309,109 on the grounds that critical findings of fact supporting the award were not based on "substantial evi-

dence" as required by the Wunderlich Act, 41 U. S. C. §§ 321-22 (1970). USL, who was not named a party in this proceeding, then moved to enter the case in order to defeat Sun's claims for additional compensation and to reduce the Secretary's award to a figure it thought was justified under applicable contract principles. The Court of Claims did permit USL to enter the case but only on a limited basis. This limitation allowed USL to present its view of the law only for the purpose of *supporting* the Secretary's decision, and not, as it had sought, to *reduce* that award to the figure it thought proper. As the case turned out, the Court of Claims found it unnecessary to consider USL's alleged errors of law since the Secretary's decision was deemed to be supported by substantial evidence.

Dissatisfied with the Court of Claims' affirmance of the administrative award, Sun petitioned the Supreme Court for review. This however was denied in an order dated November 29, 1976. With that, the Court of Claims' decision became final and bound the United States in regard to what it owed Sun for increased costs. This decision however did not determine USL's liability since USL's presence in the proceeding was for a limited purpose. As between Sun and USL, then, there remained a continuing dispute regarding cost increases.

This dispute took form in a breach of contract action filed by Sun against USL in the District Court for the Eastern District of Pennsylvania. As it did in the Court of Claims proceedings where the defending party was the United States, in the District Court action where USL was the defendant, Sun has again raised alleged improper factual findings as the basis for attacking the Secretary's award as inadequate. In defense, USL has claimed that the decision of the Court of Claims setting the amount of

the cost increase at $3,070,547.95 has *res judicata* or collateral estoppel effect on Sun's claim for compensation beyond that figure because of improper factual determinations. Further, USL has claimed that errors of law left unreviewed by the Court of Claims afford a basis for reducing the amount owed by USL to a figure considerably less than its share of $3,070,547.95. At present, the District Court in Pennsylvania has yet to decide whether these defenses are justified or even available.

The instant suit, filed in this Court shortly after the Supreme Court declined to review the decision by the Court of Claims, completes the cycle of lawsuits between the parties. It pits USL as plaintiff against the government as defendant. And as in the Court of Claims and Pennsylvania District Court proceedings, review is sought of the Secretary of Commerce's award. Further, as in these other proceedings, USL alleges that the Secretary erred by applying incorrect legal principles in fixing the amount of the cost increase at $3,070,547.95. USL seeks a declaratory judgment that the administrative decision was erroneous as a matter of law and an injunction preventing the government from taking any action under it. In response, the government has moved to dismiss the action for the reason that the complaint fails to allege a justifiable "case or controversy" within the meaning of Article III of the Constitution and because Sun is an indispensable party not able to be joined in the present proceeding. For the reasons that follow, the Court holds that a justifiable controversy does exist between the parties sufficient for jurisdiction to attach and that Sun is not an indispensable party to the present action.

The "case or controversy" question is easily resolved. Defendants steadfastly argue that once the Court of Claims decided what the government owed Sun, and once that

amount was paid, defendants ceased to have any further involvement in the cost increase dispute, leaving Sun and USL as the sole disputants. On the surface, this argument has a certain appeal. On closer scrutiny, however, it emerges that the contention rests on a false assumption. The underlying—and in the Court's view, mistaken—premise is that the only obligation imposed on defendants under the contract is the payment of a proportionate share of the total contract price. Yet in fact, the contract places other duties on the government. For one, as explained during oral argument, the government is obligated to pay Sun USL's share of the contract price in the event USL defaults in its commitment to pay. Should that occur, the government is entitled to obtain reimbursement for this amount from USL. This eventuality of default and indemnification appears to be genuine and substantial, and a decision in this case will settle whether the government is entitled to seek recourse against USL should a default occur and the government be required to shoulder the loss. In the Court's opinion, this prospect presents a live dispute between USL and defendants sufficient to satisfy the "case or controversy" requirement.

The suggestion is made that, because the government has fulfilled its primary obligation of paying what it owes to Sun, it lacks any incentive to defend against the claims made by USL in this case. The consequence of this, according to defendants, is that there is no assurance that the issues to be ligitated [sic] will be vigorously contested. This suggestion is somewhat disturbing. Aside from the fact that the prospect of default without indemnification furnishes ample incentive for the government to contest this case, the government also is motivated to litigate forthrightly in order to defend the legal principles that it, as arbiter of disputes arising under the contract, ap-

plied in making the administrative award at issue. It would demean the government's responsibility as arbiter to conclude that it lacks interest in defending the validity of *its* administrative decision.

The issue of whether Sun is an indispensable party within the meaning of F. R. Civ. P. 19 is also easily resolved. Defendants argue that the primary dispute regarding contract payments is between Sun and USL and that, because of this, Sun is a necessary party to the proceeding, in whose absence the action should be dismissed. This Court disagrees. Undoubtedly, Sun is *interested* in the outcome of the instant case since the claims advanced by USL here against the government reflect the defenses interposed by USL against Sun in the Pennsylvania District Court action. A decision of USL's claims here will furnish a considered judgment which the Pennsylvania Court is free to accept or reject. This interest however is not the kind of concern that rule 19 requires the Court to take into account in deciding whether an action should proceed with only the named parties.

One final matter remains to be considered. This is the question, raised during oral argument, of whether the Court can and should order this case transferred to the Eastern District of Pennsylvania for possible consolidation with the suit pending there between Sun and USL. In the Court's preliminary estimation, the benefits to be gained from a transfer are manifest. A transfer would finally, and for the first time, put all of the interested parties before the same Court without any limitation upon what issues could be litigated. Sun and the government are apparently committed to the goal of preventing this from happening at all costs. This would avoid the prospect of inconsistent rulings concerning the legal principles applied by the Secretary of Commerce in reaching the administra-

tive decision at issue. It would also provide a means by which the contractual obligations among *all* the parties can be ascertained with finality. For these reasons, the Court will entertain a motion supported by a memorandum of points and authorities to transfer the case at bar to the District Court for the Eastern District of Pennsylvania.

JOHN J. SIRICA
United States District Judge

September 21, 1977

ORDER
October 28, 1977

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES LINES, INC. *Plaintiff,*

v.

JUANITA KREPS, et. al., *Defendants.*

ORDER

Pursuant to the stipulation entered into by the parties herein and filed October 25, 1977, and it appearing to the Court that a transfer under 28 U.S.C.§1404(a) is fully warranted under the circumstances, it is by the Court this 28th day of October, 1977.

ORDERED that this matter be, and the same hereby is, transferred forthwith to the United States District Court for the Eastern District of Pennsylvania.

JOHNJ. SIRICA
John J. Sirica
United States District Judge

RELEVANT TEXT, WUNDERLICH ACT
41 U.S.A. 322

TEXT OF THE WUNDERLICH ACT.

Title 41 USC §321 and 322

CONTRACT-PROVISIONS MAKING DECISIONS FINAL ON QUESTIONS OF LAW.

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board. May 11, 1954, c. 199, §2, 68 Stat. 81.

Supreme Court, U. S.
FILED
DEC 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-773

UNITED STATES LINES, INC.,
Petitioner,

v.

SUN SHIPBUILDING & DRY DOCK COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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INDEX.

Page

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED 1

COUNTERSTATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

I. The Propriety of the District Court's Award of Prejudgment Interest, Affirmed by the Third Circuit, Is Not an Important Issue Requiring Consideration by This Court 7

A. The District Court Properly Decided the Question of Prejudgment Interest Under Pennsylvania Law 7

B. The Decision Below Does Not Conflict With the Decision of the Court of Claims 9

C. The District Court's Decision Does Not Conflict With This Court's Decision in *Crown Coat Front v. United States*, Nor Does It Conflict With the District Court's Own Prior Decision Regarding the Statute of Limitations 11

II. The District Court's Decision to Award Sun Compensation for Delay Associated Costs Is Not in Conflict With This Court's Decisions in *United States v. Rice and United States v. Blair* 12

CONCLUSION 15

TABLE OF CITATIONS.

Cases:	Page
California v. United States, — U. S. —, 98 S. Ct. 2985 (1978)	14
Clarke Baridon, Inc. v. Merritt-Chapman and Scott Corp., 311 F. 2d 389 (4th Cir. 1962)	8
Cold Metal Process Co. v. United Engineering & Foundry Co., 235 F. 2d 224 (3d Cir. 1956)	7
Crown Coat Front Co., Inc. v. United States, 386 U. S. 503 (1967)	2, 11, 12
E. I. Du Pont de Nemours and Company, et al. v. Lyles and Lang Construction Company, 219 F. 2d 328 (4th Cir.), cert. denied 349 U. S. 956 (1955)	8
Estate of Spiegel v. Commissioner, 335 U. S. 701 (1949)	7
Hawaiian International Shipping Corp., MSB No. CA-98, 18 SRR 673 (1978)	4
Helvering v. Stuart, 317 U. S. 154 (1942)	7
Houston Oil Co. of Texas v. Goodrich, 245 U. S. 440 (1918)	9
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387 (1923)	9, 10
Marrazzo v. Scranton Nehi Bottling Co., Inc., 438 Pa. 72, 263 A. 2d 336 (1970)	7
Miller v. Robertson, 266 U. S. 243 (1924)	7
Pennsylvania Turnpike Commission v. Sanders & Thomas, Inc., 461 Pa. 420, 336 A. 2d 609 (1975)	8
Prudential Insurance Co. v. City of Philadelphia, No. 73-110 (E. D. Pa. Oct. 24, 1975), aff'd No. 76-1559 (3d Cir. Jan. 7, 1977)	7
Rice v. Sioux City Memorial Park Cemetery, 349 U. S. 70 (1955)	9
Rolls-Royce, Ltd. v. United States, 364 F. 2d 415 (Ct. Cl. 1966)	10
Steele v. General Mills, Inc., 329 U. S. 433 (1947)	7
Swartzbaugh Manufacturing Company v. United States, 289 F. 2d 81 (6th Cir. 1961)	8
Udall v. Tallman, 380 U. S. 1 (1965)	14

TABLE OF CITATIONS (Continued).

Cases (Continued):	Page
United States v. American Trucking Associations, Inc., 310 U. S. 534 (1940)	14
United States v. Blair, 321 U. S. 730 (1944)	2, 12, 13, 14
United States v. King, 395 U. S. 1 (1969)	10
United States v. Rice, 317 U. S. 61 (1942)	2, 12, 13
United States v. Thayer-West Point Hotel Co., 329 U. S. 585 (1947)	10
Statutes and Court Rules:	
Federal Register, 36 FR 5805	3
28 U. S. C. § 2516(a)	10
U. S. Sup. Ct. Rule 19, 28 U. S. C.	6, 11
Merchant Marine Act of 1936, as amended, 46 U. S. C. § 1101, et seq.	3, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-773.

UNITED STATES LINES, INC.,
Petitioner,

v.

SUN SHIPBUILDING & DRY DOCK COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

The respondent, Sun Shipbuilding and Dry Dock Company (hereinafter "Sun"), submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit filed by petitioner United States Lines, Inc. (hereinafter "USL"), and respectfully prays that the petition for writ of certiorari be denied.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED.

Two primary questions are presented by this case, neither of which is worthy of review by this Court. They are as follows:

I. Whether, in the factual circumstances of this diversity case, the district court properly awarded prejudgment interest to Sun under the law of Pennsylvania?

II. Whether the district court's finding that Sun was entitled to recover delay associated costs under the now superseded contract provisions involved in this action between two private parties is contrary to this Court's interpretation of different language in contracts between the government and private parties in *United States v. Rice*, 317 U. S. 61 (1942), and *United States v. Blair*, 321 U. S. 730 (1944)?

USL has split the first issue into four. Although none of these subissues is appropriate for this Court's consideration and all are subsumed into the primary issue stated by Sun, USL's first and third issues should be restated as follows to achieve clarity and accuracy:

Whether the district court's award of prejudgment interest to Sun on amounts due from USL for work performed during the construction of five ships was contrary to a prior Court of Claims decision in the case of *Sun Shipbuilding and Dry Dock Company v. United States of America*, Court of Claims No. 61-73, and whether the district court properly considered that decision?

Whether the district court's decision to award prejudgment interest, in accordance with Pennsylvania law, from a time one year after Sun's submission of its final estimate of change costs conflicts with this Court's decision in *Crown Coat Front Co., Inc. v. United States*, 386 U. S. 503 (1967), holding that a government contractor's cause of action accrues upon completion of a mandatory disputes process because, among other reasons, the contractor could not have initiated suit before exhausting administrative remedies?

COUNTERSTATEMENT OF THE CASE.

Respondent Sun is a shipbuilding company. On November 24, 1965, it delivered to USL the last of five cargo vessels it had constructed for USL. As of that date, Sun had already paid out all monies necessary to complete the vessel. At the filing of this brief—more than thirteen years later—Sun still has not received from USL the full amount due for the ships. USL, on the other hand, has had both the use of the ships and the use of the money for this time period. On June 28, 1977, almost twelve years after delivery, USL did consent to an order of partial summary judgment for $460,106.03—a portion of Sun's claim that, although not disputed, had not been paid by USL at that late date. As of today, another $466,511.14 in principal still remains outstanding. Interest has not been paid on any of the money owed, although a judgment for the principal and $601,363.00 in interest was entered on November 30, 1977 (175a).

The history of this inequitable saga began on October 10, 1962, when Sun, as low bidder under the procedures of the Ship Construction Subsidy Program then in effect, entered into a tripartite Maritime Administration Construction Differential Subsidy Contract with USL and the United States Maritime Administration ("MarAd") for the construction of five cargo vessels.[1] Under the terms

1. The Ship Construction Subsidy Program derives its statutory authority from the Merchant Marine Act of 1936, 46 U. S. C. §§ 1101, 1151-1161. Since the events of this case the Act has been amended by The Merchant Marine Act of 1970 (PL 91-469). The standard form construction-differential subsidy contract used prior to 1970 (and used in this case) was outmoded by that amendment. Therefore on March 27, 1971, the Maritime Subsidy Board published in the Federal Register, 36 FR 5805, a notice of proposed rulemaking stating that the Board was contempating adopting new contract forms changing numerous provisions including the crucial "Changes" and "Disputes" provisions. The former tripartite contract was also to be separated into three separate two-party con-

of the contract, USL was to pay 51.4% of the price of the vessels and MarAd was to subsidize the cost to USL of the construction of the vessels to the extent of 48.6%.

According to the contract, the five ships were to be delivered at intervals between September 29, 1964, and July 26, 1965. Sun's low bid, however, was predicated on its ability to deliver the ships substantially early. Thus Sun scheduled the first ship for delivery in July, 1964 with the remaining ships to follow at 75-day intervals.

On May 31, 1963, however, Sun was ordered to perform a technically difficult and time-consuming change in the construction of the vessels: automation of the engine rooms. On October 1, 1963, Sun was further ordered over its strong protestations to effect a rearrangement of the crew quarters. These changes were directed in accordance with Article 4 of the contract which permitted USL and MarAd unilaterally to order changes in the construction of the vessels. When such a change order was directed, the contract required the Contractor (here Sun) to proceed promptly with the work, even if there was a dispute regarding the estimated cost of the change. (Article 4(b) and (e), 14a-16a).

Despite these significant and complex changes, Sun performed the contract expeditiously and delivered the ships at intervals from November 12, 1964 to September 24, 1965—an average of only 46 days later than the contract delivery dates. On November 24, 1965, two months after delivery of the final vessel, Sun submitted a claim for more than $5,000,000 for the increased costs resulting from the change orders and the delays caused by them.[2]

1. (Cont'd.)
tracts. New contract forms are now being used. The type of contract used today is described briefly in *Hawaiian International Shipping Corp.*, MSB No. CA-98, 18 SRR 673 (1978).

2. The contract provided in Article 4(e) that the shipbuilder would be compensated for changes as follows:

In an attempt to collect this contractually provided compensation, Sun began wending its way through a labyrinth of hearings and decisions. USL's Petition sets forth most of the crucial stages in this extended administrative disputes process.[3]

Finally in January of 1972—more than six years after delivery of the last ship, the Secretary of Commerce determined that the increased cost resulting from the changes was $3,070,547.95.

The final administrative decision having been rendered, Sun, on February 8, 1972, in accordance with the contract,[4] submitted applications for a progress payment. MarAd paid its 48.6% of the progress payment, but USL still refused to pay. Sun therefore notified MarAd of USL's refusal to pay in accordance with Article 31 of the contract which provides that in certain circumstances the Government must assume the obligations of a defaulting owner. When the Government refused to pay USL's share, Sun filed a petition in the Court of Claims proceedings described at pages 5 and 6 of USL's Petition.

Since the Court of Claims had no jurisdiction of any claims by Sun against USL, however, Sun brought the present diversity suit on August 7, 1975 to recover $926,617.17—the amount still due at that time from USL, plus prejudgment interest. During the course of the proceedings in the district court, the partial summary judgment order referred to above was entered. The rest of

2. (Cont'd.)
One hundred and ten percent (110%) of the net increase in estimated cost, if any, resulting from all change cost estimates, as approved or finally determined, shall be added to the contract price as an adjustment thereof.
(16a).

3. Article 36 of the General Provisions of the Contract, found at 21a-22a of the Appendix, sets forth part of the procedure for resolving disputes.

4. Articles IV and 31 at 4a-9a and 20a-21a.

the judicial proceedings are described by USL at page 7 of its Petition. The remainder of the amount found to be due to Sun in the administrative process, by the district court and by the court of appeals is still unpaid.[5]

REASONS FOR DENYING THE WRIT.

This is a diversity case involving the application of Pennsylvania law to an ordinary contract dispute between two private parties. The district court's decision, affirmed by the Third Circuit, relies on the particular facts and equities of this case, interprets the specific contract language at issue, and applies traditional legal principles (143a). The contract involved in this dispute is no longer used by the Maritime Administration and the shipbuilding industry. (See Footnote 1, *supra*). No "special and important reasons" exist for this Court to exercise its discretionary power to review the issues of this limited case. U. S. Sup. Ct. 19, 28 U. S. C.

Nevertheless USL has filed a petition for a writ of certiorari and has listed five "Questions Presented." The five questions actually fall into the two primary categories stated by Sun above: (1) the propriety under Pennsylvania law of the district court's award of prejudgment interest, and (2) Sun's right to compensation for costs resulting from delay caused by USL and the Government's change orders.

5. USL's 51.4% share of the Secretary's award ($3,070,547.95) was $1,578,261.65. USL had paid $651,644.48 prior to the instant action leaving a remainder of $926,617.17 due. The district court granted Sun $460,106.03 in principal on its partial summary judgment order, and $466,511.14 in principal in its full summary judgment for a total of $926,617.17. The District Court granted Sun in its full summary judgment order prejudgment interest on the $926,617.17 from November 24, 1966 at the legal rate of 6% in the amount of $601,363.00.

I. The Propriety of the District Court's Award of Prejudgment Interest, Affirmed by the Third Circuit, Is Not an Important Issue Requiring Consideration by This Court.

A. The District Court Properly Decided the Question of Prejudgment Interest Under Pennsylvania Law.

In this diversity action, the district court decided that under Pennsylvania law[6] "the court, in its discretion, may in a particular case find that the equities of the circumstances demand an award of interest and may grant such an award as it deems proper" (147a). The court necessarily found that Pennsylvania law did not require either a breach of contract or the right to demand payment of the principal amount as a prerequisite to prejudgment interest. USL now petitions this Court to review this decision even though the district court carefully considered each of the issues raised by USL and the Third Circuit affirmed the lower court's decision.

This Court has enunciated a firm policy to leave undisturbed a reasonable interpretation of purely local state law by a court of appeals (or district judge) which sits within a state and is constantly required to pass upon state law questions. *Estate of Spiegel v. Commissioner*, 335 U. S. 701, 707-8 (1949); *Steele v. General Mills, Inc.*, 329 U. S. 433, 439 (1947); *Helvering v. Stuart*, 317 U. S. 154, 162-5 (1942). The Court should not depart from that policy in this case.

6. The court cited, *inter alia*, the following cases: *Miller v. Robertson*, 266 U. S. 243, 258 (1924); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 235 F. 2d 224, 231 (3d Cir. 1956); *Prudential Insurance Co. v. City of Philadelphia*, No. 73-110 (E. D. Pa. Oct. 24, 1975), *aff'd* No. 76-1559 (3d Cir. Jan. 7, 1977); *Marrazzo v. Scranton Nehi Bottling Co., Inc.*, 438 Pa. 72, 74-5, 263 A. 2d 336 (1970) (147a).

As the district court noted, the rules on discretionary prejudgment interest are similar under Pennsylvania and federal law (146a). Both permit such an award where the equities of the particular case demand it. For example, in an analogous case, the Pennsylvania Supreme Court has approved an award of interest from a time prior to the rendering of an arbitration award under the disputes clause of a construction contract with a state agency. *Pennsylvania Turnpike Commission v. Sanders & Thomas, Inc.*, 461 Pa. 420, 336 A. 2d 609 (1975). Numerous federal cases interpreting government contracts have also awarded prejudgment interest, not on the basis of breach of contract, but primarily on equitable bases or on the ground that the right to interest was an implied part of the contract.[7]

After finding the applicable law, the court then turned to the facts of the case and held:

> In view of *these facts*, I conclude that the *equities in this case* weigh heavily in plaintiff's favor, and I have therefore exercised my discretion to award prejudgment interest to Sun.

(Emphasis added) 149a.[8]

The district court also decided to award interest from November 24, 1966—one year after submission of Sun's final cost estimate—by looking to the overall scheme of the entire contract (151a).

USL complains at length in its petition that the court's interpretation of the contract was erroneous (Petition, pp. 12-15). The court's analysis was not erroneous, as a reading of the contract and the opinion will show. More important, however, the construction of a contract no longer used, in conjunction with an analysis of the particular facts affecting the operation of that contract, is not an appropriate issue for exercise of this court's discretionary review.[9] The government is not a party, and the decision would affect few, if any, persons other than USL and Sun. This Court has clearly stated that:

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387, 393 (1923). *Accord: Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70, 74 (1955).

In an effort to obscure the clear unworthiness of its request for this Court's review, USL formulates two more issues concerning prejudgment interest each of which alleges a conflict with another decision. Neither are meritorious, but are briefly discussed below.

B. The Decision Below Does Not Conflict With the Decision of the Court of Claims.

USL asserts that the decision of the district court that Sun's payment demand became "payable" on November

7. *E. I. DuPont de Nemours and Company, et al. v. Lyles and Lang Construction Company*, 219 F. 2d 328 (4th Cir.), *cert. denied* 349 U. S. 956 (1955); *Clarke Baridon, Inc. v. Merritt-Chapman and Scott Corp.*, 311 F. 2d 389 (4th Cir. 1962); *Swartzbaugh Manufacturing Company v. United States*, 289 F. 2d 81 (6th Cir. 1961).

8. See also last paragraph of 147a and last paragraph of section A on 150a.

9. *Cf. Houston Oil Co. of Texas v. Goodrich*, 245 U. S. 440 (1918), where a writ of certiorari was dismissed as improvidently granted because the alleged legal errors of the lower court "depended essentially upon an appreciation of the evidence." Also of significance was the agreement on the issues between the district court and the court of appeals. *Cf. Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70 (1955) where one reason for dismissing a writ of certiorari as improvidently granted was that the question would not arise again as a result of a new statute enacted after commencement of the law suit at issue.

24, 1966 for purposes of calculating interest conflicts with the Court of Claims' interpretation of the contract. This assertion is insupportable.

The issue before the Court of Claims was whether the government had breached Article 31 of the contract (20a-21a) by failing to pay USL's share of the Secretary of Commerce's award after USL had refused to pay (119a-121a). The Court of Claims decided that the Secretary's award was not 'final" for purposes of activating the obligations under Article 31. It did not decide whether the award was "final" for any other purposes or when the debt was "payable." The issues before the district court and the Third Court were whether Sun was entitled to prejudgment interest and, if so, from what date.

The Court of Claims simply was not presented with the interest issues that confronted the district court.[10] Nor could it have been. First, the suit in the Court of Claims was brought only against the government, not against USL. The Court of Claims does not have jurisdiction over actions for money damages between private parties, *Rolls-Royce Ltd. v. United States*, 364 F. 2d 415 (Ct. Cl. 1966); nor does it have the power to grant declaratory judgments. *United States v. King*, 395 U. S. 1 (1969). Second, Sun's petition in the Court of Claims did not request interest since interest is not recoverable against the United States under 28 U. S. C. § 2516(a), unless a contract or act of Congress specifically provides for its payment. *United States v. Thayer-West Point Hotel Co.*, 329 U. S. 585, 590 (1947). Thus no conflict exists between the Court of Claims decision and the district court's decision.[11]

10. The district court describes the dichotomy of the issues at 152a-153a, n. 10.

11. This Court has dismissed writs of certiorari as improvidently granted where there was no conflict between courts as had been alleged in the petition. *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387 (1923).

USL further asserts that the district court erroneously failed to reach the merits of USL's collateral estoppel defense. This Court, however, is not a court that sits merely to provide an appellate forum for the correction of lower court errors. Review by this Court is a matter of discretion[12] and should be exercised only when an important and recurring issue arises. This is not such an issue.

In any event, the district court did consider the collateral estoppel issue. Like the interest issue, the collateral estoppel question is controlled by Pennsylvania law, which the court discussed at length in its opinion, and correctly applied (154a-155a).[13]

C. The District Court's Decision Does Not Conflict With This Court's Decision in *Crown Coat Front v. United States*, Nor Does It Conflict With the District Court's Own Prior Decision Regarding the Statute of Limitations.

USL contends for the first time[14] in its petition for certiorari that the district court's decision to begin interest from a date one year after submission of the final estimate conflicts with this Court's holding in *Crown Coat Front Co., Inc. v. United States*, 386 U. S. 503 (1967). This also is insupportable. The issue in *Crown Coat Front* was whether a contractor's right to bring a civil action on a claim within the standard disputes clause of a different government contract accrued at the time of the final administrative action or at an earlier date. The Court de-

12. U. S. Sup. Ct. Rule 19, 28 U. S. C.

13. The district court statement that USL quotes at p. 10 of its petition—"Without reaching the merits of the res judicata argument . . ."—is taken from a footnote in the section preceding the court's discussion of the collateral estoppel defense (152a-153a, n. 10).

14. This issue was not specifically raised in USL's brief to the United States Court of Appeals for the Third Circuit, nor was it discussed in USL's Memorandum in Support of its Motion for Summary Judgment.

cided on the former date, finding, *inter alia,* that in order to protect a contractor who might be subjected to a lengthy administrative process from being time-barred from the courts, the 6-year statute of limitations should not commence until the termination of the administrative proceedings. The Court was not presented with any question under state law regarding the obligation of payment or the commencement of interest, and its statute of limitations decision does not conflict with the district court's interest decision.

USL further claims that the district court's decision is in conflict with the district court's previous decision, similar to *Crown Coat Front,* finding that the applicable four-year statute of limitations did not begin to run until the completion of the disputes process.[15] The two decisions are not incompatible. In the first decision (130a), the court decided when Sun could sue USL in court. In the second decision it decided from what date Pennsylvania law permitted Sun to collect interest. Furthermore, the court made clear at the outset of its second opinion that its decision was based, not upon a default by USL and not upon a finding that Sun had the right to demand payment, but rather upon the equities of the case. No conflict exists between these opinions and no reason exists for the Court to exercise its discretion to review this meritless and unimportant issue.

II. The District Court's Decision to Award Sun Compensation for Delay Associated Costs Is Not in Conflict With This Court's Decisions in *United States v. Rice* and *United States v. Blair.*

The district court held, and the Third Circuit concurred, that Sun was entitled to recover $466,511.14 from

15. The district court, however, was presented with this alleged conflict in USL's Motion for Reconsideration and found that allegation to be without merit (173a-174a). The Third Circuit agreed.

USL for delay associated costs resulting from the changes ordered under the contract (155a-160a, 175a). In doing so, the courts affirmed the decisions of the Secretary of Commerce (114a-118a) and the Maritime Subsidy Board (23a, 48a-64a) on that issue. USL contends, however, that an award of any delay-associated costs is in conflict with this Court's decision in *United States v. Rice,* 317 U. S. 61 (1942). It further argues that even if compensation for some delay associated costs is appropriate, an award of such compensation for delay suffered prior to the contract delivery dates of the vessels is in conflict with this Court's decision in *United States v. Blair,* 321 U. S. 730 (1944). Neither of these assertions has any merit.

The contract provisions relied on in *Rice* are substantially different from those at issue in this case.[16] Where the *Rice* contract provisions made a dichotomy between a change in the amount due under the contract and a change in the time limit for completion, providing more money for the first and more time for the second, the contract provision in the case now before this Court deals only with monetary compensation for the increases (or decreases) in the cost of performing all of the contract work (Article 4, 14a-16a). All extensions of time are dealt with in a completely separate article (Article 5, 164a-166a).

In *Rice,* this Court directed that any inquiry concerning the recoverability of certain costs must focus on the precise language of the contract. 317 U. S. at 66-68. Since the precise language of the contract at issue is different from the precise language of *Rice,* the district court's decision is not in conflict with this Court's opinion in *United States v. Rice.*[17]

16. The *Rice* contract provisions are found at 317 U. S. 66, n. 1.

17. In the proceedings before the Board, the government, as third party to the contract, did not question the inapplicability of *Rice,* even though that position was contrary to its financial interest (48a).

Petitioner's only argument relating to *Blair* is that it "requires" that the language of the contract "must explicitly state the obligation" to pay pre-delivery date costs (Petition at 28). *Blair* says no such thing. All that *Blair* holds is that a suit against the United States by one contractor for breach of contract for unreasonably delaying the termination of another contractor, which delay prevented early completion of the first contract, will not succeed in the absence of a clause in the first contract putting the responsibility for prompt termination of other contractors on the government. No question exists in this case as to the responsibility of USL and the United States under the contract. They were clearly obligated to pay for the net increase in the cost of the contract work resulting from the changes they directed. Because of the dissimilarity of the contracts, the district court's opinion is not in conflict with *United States v. Blair.*

The Maritime Subsidy Board, the agency charged with administering MarAd contracts, also rejected USL's *Rice* and *Blair* arguments. In reaching its decision the district court properly put great weight on the Board's decision "in view of the Maritime Administration's experience with the standard contract at issue here. . . ." (157a). This Court has often held that great deference is to be given the views of the agency charged with the day-to-day operation of a statutory[18] or administrative program. *Udall v. Tallman,* 380 U. S. 1, 16-18 (1965). *See, California v. United States,* — U. S. —, 98 S. Ct. 2985, 3001, n. 30 (1978); *United States v. American Trucking Associations, Inc.,* 310 U. S. 534, 539 (1940).

Since the district court was correct in holding *Rice* and *Blair* inapplicable, its decision does not conflict with those cases.

18. Here the contracts, no longer in use, were drafted pursuant to the Merchant Marine Act of 1936, as amended, 46 U. S. C. §§ 1151-1161.

CONCLUSION.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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